UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

SUSPENSION
OF THE
POWER OF ALIENATION,
AND
POSTPONEMENT OF VESTING,

UNDER THE LAWS OF NEW YORK.

WITH AN APPENDIX

CONTAINING REFERENCES TO THE STATUTES AND DECISIONS IN THE STATES
OF MICHIGAN, MINNESOTA AND WISCONSIN.

BY

STEWART CHAPLIN,

\\
COUNSELLOR AT LAW.

SECOND EDITION.

NEW YORK:
BAKER, VOORHIS & COMPANY,
1911.

T
C 36507
1911

Copyright, 1891,
By STEWART CHAPLIN.

Copyright, 1911,
By STEWART CHAPLIN.

PREFACE

TO THE FIRST EDITION.

The well-known works of Mr. Lewis and of Mr. Marsden on Perpetuities, and of Professor Gray on Perpetuities, and on Restraints on Alienation, deal with the law in force in England, and in many of our States. With the adoption of the Revised Statutes, however, New York abandoned the system embodied in this law, and instituted a system of her own, which, except in its application to personal property, has since been adopted in Michigan, Minnesota and Wisconsin.

The changes thus introduced have been of so radical a character as to render inapplicable, to a large degree, the treatises and reports embodying the earlier law. The present book deals with the law of New York, Michigan, Minnesota and Wisconsin, on the subject of suspension of the power of alienation, and of ownership, and postponement of vesting, and points out, in an appendix, certain features in which the laws of the three latter States differ from those of New York. The appendix also gives the statutes of seven other States, which have followed the lead of New York in so far as to substitute for the Rule against Perpetuities a statutory provision against suspension of the absolute power of alienation, and in which many of the principles discussed in the following pages are consequently applicable.

NEW YORK, October, 1891.

PREFACE

TO THE SECOND EDITION.

It is now twenty years since the first edition of this book was published. During that time the statutory provisions which were there considered, and which were then a part of the Revised Statutes, have been repealed, and re-enacted, sometimes in altered form, in the Real Property Law and the Personal Property Law; and these again, with amendments, are now chapters of the Consolidated Laws.

For the same period, the reports contain many cases dealing with interesting and important subjects in this field. Many questions which were open, twenty years ago, and were discussed at length, have now been answered by the courts, and thus call only for brief statement. New questions, however, of importance, have come forward for attention, and are here fully considered.

With the former edition, and all the statutory changes, and the new reported cases, as material, the book has been re-written from beginning to end, with a hope that the result may at least indicate a sincere appreciation of the kindly reception and continued favor which have been accorded by the profession.

September, 1911.

CONTENTS.

	PAGE.
TABLE OF STATUTES.....	xi
TABLE OF CASES.....	xxi

CHAPTER I.

INTRODUCTORY.

	SECTIONS.
THE THREE RULES.....	1-7
Rule I. Alienability.....	2-3
Rule II. Vesting.....	4-6
Rule III. Absolute Ownership.....	7
SCOPE OF THE RULES.....	8-11
HISTORICAL.....	12-19
PURPOSES OF THE RULES.....	20-28

CHAPTER II.

GENERAL PRINCIPLES.

ALIENABILITY. THE GENERAL STATUTORY PROVISION.....	29-30
THE ABSOLUTE POWER OF ALIENATION.....	31-37
NO PERSONS IN BEING.....	38-70
THE STATUTORY PERIOD.....	71-123
The Creation of the Estate.....	72-73
Two Lives in Being.....	74
Two Lives the Necessary Measure. Exception... ..	75-77
Designation of the Lives.....	78-79
Any Two Lives may be Designated.....	80

	SECTIONS.
Part of a Life is a Life.....	81
A Minority is a Life.....	82
The Period of Gestation.....	83
Life of Eldest or Youngest Surviving Child.....	84
Life of Wife, Widow, Husband.....	85
The Additional Term of Minority.....	86-93
The Statutory Requirement is Imperative.....	94-95
Subordinate Measures of Period when Permitted.....	96-99
Alternative Lives, when Permitted.....	100
Successive Suspensions under Successive Instruments.....	101
Separate Statutory Periods for Separate Shares.....	102-112
Number of Beneficiaries is not Limited.....	113
Illegal Term is not Presumed.....	114-115
The Statutory Period for Contingencies.....	116
The Statutory Period for Trusts to Apply Rents.....	117
The Statutory Period for Trusts to Accumulate Rents....	118
The Statutory Period as to Powers.....	119
The Statutory Period as to Chattels Real.....	120
The Statutory Period as to Disposition of Rents.....	121
The Statutory Period for Postponement of Vesting.....	122
The Statutory Period as to Personal Property.....	123
CERTAIN DISPOSITIONS NOT AFFECTED.....	124-138

CHAPTER III.

SUSPENSION OCCASIONED BY CONTINGENCIES.....	139-164
---	---------

CHAPTER IV.

SUSPENSION OCCASIONED BY EXPRESS TRUSTS.

THE FOUR CLASSES OF EXPRESS TRUSTS.....	165-172
THE TRUSTEE AND THE BENEFICIARY.....	173-181
WHAT TRUSTS OCCASION SUSPENSION.....	182-198
LEASES UNDER EXPRESS TRUSTS.....	199-200
TRUST TO SATISFY MORTGAGE FROM RENTS.....	201-204
TRUST TO PAY ANNUITY FROM RENTS.....	205-210
STATUTORY PERIOD FOR TRUSTS TO ACCUMULATE.....	211-221
STATUTORY PERIOD FOR TRUSTS TO APPLY RENTS.....	222-240
COMBINATION OF DIFFERENT TRUSTS AND POWERS.....	241-243
RENTS AND PROFITS UNDISPOSED OF.....	244-245

CHAPTER V.

SUSPENSION OCCASIONED BY POWERS.

	SECTIONS.
POWERS DEFINED AND CLASSIFIED.....	246-249
RELATION OF POWERS TO TITLE.....	250
RELATION OF POWERS TO SUSPENSION.....	251-257
POWERS THAT DO NOT OCCASION SUSPENSION.....	258-268
(a) Beneficial Powers.....	259
(b) General Powers to Sell or Convey.....	260
(c) Powers to Hold and Manage.....	261
(d) Determinable Powers to Sell in Future.....	262-266
(e) Revocable Powers.....	267-268
POWERS THAT DO OCCASION SUSPENSION.....	269-292
(a) Powers of Sale, Proceeds to Trustee.....	270-272
(b) Powers of Sale, Proceeds to Persons not in Being....	273-275
(c) Imperative Powers to Appoint.....	276-280
(d) Imperative Powers to Convey.....	281-285
(e) Non-Terminable Powers to Sell in Future.....	286-292
POWERS THAT OBLIATE SUSPENSION.....	293
THE STATUTORY PERIOD AS TO POWERS.....	294-298

CHAPTER VI.

POSTPONEMENT OF VESTING.

RULE II. VESTING.....	299-312
Historical	300-301 <i>g</i>
The General Statutory Scheme.....	302-303
"Remainders.".....	304-308
"Within" the Statutory Period.....	309
"Must Vest." "If Ever.".....	310
Must Vest "in Interest.".....	311-312
SOURCES OF RULE II.....	313-367
Remainder on a Fee.....	314-318
Remainder on an Estate for Life ...	319-334
Remainder on a Term of Years.....	335-341
Remainder on Estate in Trust.....	342-351
Remainder on Execution of Power.....	352-364
Remainder in Default of Appointment.....	365
Remainder to a Class.....	366-367
THE STATUTORY PERIOD FOR POSTPONEMENT.....	368

CHAPTER VII.

PERSONAL PROPERTY.

	SECTIONS.
RULE III. ABSOLUTE OWNERSHIP	369-386
The General Statutory Provision	370-371
The Meaning of Absolute Ownership	372-386
SUSPENSION BY CONTINGENCIES.....	387-394
SUSPENSION BY EXPRESS TRUSTS.....	395-411
SUSPENSION BY POWERS.....	412
THE STATUTORY PERIOD.....	413

CHAPTER VIII.

GIFTS FOR CHARITY.

PRIOR TO LAWS 1893, CHAPTER 701.....	414-417
SINCE LAWS 1893, CHAPTER 701.....	418-420

CHAPTER IX.

EQUITABLE CONVERSION.....	421-425
---------------------------	---------

CHAPTER X.

SEPARABILITY.

GENERAL PRINCIPLES.....	426-429
ALTERNATIVE FUTURE DISPOSITIONS.....	430-443
Simple Alternative Contingencies.....	433
Involved Alternative Contingencies.....	434-440
Contingencies with an Alternative Application.....	441-443

CHAPTER XI.

CONSTRUCTION.....	444-510
-------------------	---------

TABLE OF CONTENTS.

xi

CHAPTER XII.

	SECTIONS.
CONFLICT OF LAWS.....	511-522

APPENDIX.

MICHIGAN, MINNESOTA AND WISCONSIN.....	523-525
--	---------

	PAGE.
TABLE OF INDEX TOPICS.....	357
INDEX.....	359

TABLE OF STATUTES.

NEW YORK STATUTES.

Code of Civil Procedure.

Sec. 1391	Page 31, 116
1537	25
1871	31
1873	31
1879	31
2463	31

County Law.

Sec. 152	Page 285
----------	----------

Decedent Estate Law.

Sec. 13	Page 17
17	285
29	345
47	348
93	49

Domestic Relations Law.

Sec. 52	Page 268
59	102

Personal Property Law.

Sec. 11	Page 31, 32, 38, 39, 40, 138, 222, 256, 263, 265, 267, 268, 272
12	283
13	283
13a	283, 285, 356
	xiii

Sec.	Page
14	283
15	31, 143, 267, 268
16	128, 132, 133, 268
17	116, 133
18	261
23	23, 26, 28, 268
34	31, 32

Real Property Law.

Sec.	Page
10	17
14	17
15	17
30	231
32	217, 330, 345
33	38
35	84, 85
36	85, 90
37	207, 208
38	205, 207, 224
39	207
40	85, 92, 207, 319, 330
41	163, 247
42	13, 16, 38, 39, 40, 46, 47, 48, 51, 73, 99, 131, 134, 135, 136, 137, 138, 141, 142, 150, 170, 174, 175, 201, 205, 216, 249, 251
43	211, 220, 221, 222, 228
44	221, 228
45	221, 228
46	229
47	211
48	343
49	38, 74, 75, 84, 229, 250
50	54, 84, 205, 207, 209, 216, 221, 229
51	53, 201, 296
52	205, 214
53	205
54	205, 320
55	205
56	49, 205
57	205, 207
58	205, 207
59	85, 88
60	38, 74, 84, 136, 137, 138
61	52, 115, 120, 127, 128, 129, 130, 131, 135

TABLE OF STATUTES.

xv

Sec. 62	Page 116, 128
63	128, 145
64	38
65	224
66	70, 228
91	100, 279
92	38
93	102
96	4, 21, 31, 99, 100, 109, 110, 112, 114, 118, 119, 120, 121, 122, 123, 124, 125, 126, 135, 141, 142, 144, 236, 279
9.	107, 121
98	31
99	101, 293
100	104, 107, 108
101	105
102	106
103	31, 33, 36, 103, 113, 114, 117, 121, 143
105	103, 110, 267
106	103
107	103
109	43
110	43
113	282, 285
114	282, 285
114a	282, 285, 356
115	282
130	4, 149, 278
131	84, 147, 172, 174
133	148
134	148
135	148
136	148, 154
137	148
138	148
144	27, 84, 149, 172, 174
145	27
148	27, 158
149	149, 154, 175
150	149, 154, 175
151	149, 154, 172, 175
152	149, 154, 175
153	149, 154, 175
154	149
157	73, 163
158	162, 163
160	163

Sec. 161	Page 149
162	149
163	168
170	168
171	168
172	168
173	27
174	27
177	73
178	84, 150, 164, 172, 175
179	84, 150, 152, 171, 172, 174, 175
182	149
240	308
244	38
461	140

Religious Corporation Law.

Sec. 7	285
--------	-----

Statutory Construction Law.

Sec. 95	138
---------	-----

MICHIGAN STATUTES.

354-356.

MINNESOTA STATUTES.

354-356.

WISCONSIN STATUTES.

354-356.

TABLE OF CASES.

(References are to pages.)

Ackerman v. Gorton, 67 N. Y. 63..	175, 312
Ackermann, Matter of, 36 Misc. 752, 74 N. Y. Supp. 477.....	277
Adams v. Berger, 18 N. Y. Supp. 33.....	54
Adams v. Massey, 184 N. Y. 62.....	311
Adams v. Perry, 43 N. Y. 487.	96, 101, 166, 279, 280, 290, 291, 293
Adams v. Wilbur, 1 Fed. Cas. No. 70.....	140
Ahearn v. Ahearn, 52 App. Div. 356.....	42, 46, 48
Akin v. Kellogg, 119 N. Y. 441.....	292
Allen, Matter of, 151 N. Y. 243.	248, 312
Allen v. Allen, 149 N. Y. 280.....	15, 21, 22, 51, 67, 160
Allen v. Stevens, 161 N. Y. 122.....	281, 284, 285, 293
Almstaedt v. Bendink, 47 App. Div. 265.....	41
Altrock v. Vandenburg, 25 N. Y. Supp. 851.....	95
Amherst College v. Ritch, 151 N. Y. 282.	102, 281, 285
Amory v. Lord, 9 N. Y. 403.....	104, 108, 137, 232, 290
Anderson v. Jackson, 16 Johns. 382.....	343
Andrews v. Whitney, 82 Hun, 117.....	32
Armstrong v. McKelvey, 104 N. Y. 179.....	157, 288
Arnold v. Congreve, 1 Russ. & M. 209.....	304
Arnold v. Gilbert, 5 Barb. 190.....	291
Arnot v. Arnot, 75 App. Div. 230.....	48
Asche, Matter of, 75 App. Div. 486.....	26
Asche v. Asche, 113 N. Y. 232.....	99, 104, 105, 106, 287, 292
Ashforth, <i>In re</i> , L. R. (1905) 1 Ch. Div. 535.....	190
Attenborough v. Attenborough, 1 K. & J. 296.....	163
Atwater v. Russell, 49 Minn. 57.....	354, 356
Austin v. Oakes, 117 N. Y. 577.....	73, 108, 344
Avery v. Everett, 110 N. Y. 317.....	24, 86, 346
Ayres v. Trustees, 3 Sandf. 351.....	281
Baer, Matter of, 147 N. Y. 344.....	94, 165, 166, 248, 312, 339, 341, 343
Bailey v. Bailey, 97 N. Y. 460.....	45, 61, 71, 134, 141, 292
Baird, Matter of, 126 App. Div. 439.....	138
Baker, Matter of, 12 State Rep. 741.....	70
Baker v. Lorillard, 4 N. Y. 257.	73, 87

(References are to pages.)

Baltes v. Union Trust Co., 180 N. Y. 183.....	25, 32, 267, 268
Bank of Niagara v. Talbot, 110 App. Div. 519; 184 N. Y. 576.....	76
Banks v. Phelan, 4 Barb. 80.....	251
Banzer v. Banzer, 156 N. Y. 429.....	80, 310
Barber v. Brundage, 169 N. Y. 368.....	85
Barber v. Cary, 11 N. Y. 397.....	5
Barbour v. DeForest, 95 N. Y. 13.....	128, 131, 146, 268
Barker v. Crosby, 32 Barb. 184.....	291
Barnard v. Gantz, 140 N. Y. 249.....	28
Barrow v. Richard, 8 Pai. 351.....	97
Barry v. Lambert, 98 N. Y. 300.....	266
Barson v. Mulligan, 191 N. Y. 306.....	310, 346
Bascom v. Albertson, 34 N. Y. 584.....	279, 280, 281, 349
Bascom v. Weed, 53 Misc. 496.....	64, 248
Bean v. Bowen, 47 How. Pr. 306.....	41, 129, 291
Bean v. Hockman, 31 Barb. 78.....	41, 45, 50
Beardsley v. Hotchkiss, 96 N. Y. 201.....	18, 24, 56, 57, 86, 173, 223, 251
Beaver v. Beaver, 117 N. Y. 421.....	99, 267
Beck v. McGillis, 9 Barb. 35.....	17
Becker, Matter of, 59 Misc. 135.....	76
Becker v. Becker, 13 App. Div. 342.....	47, 49, 126
Becker v. Chester, 115 Wis. 90.....	355
Beecher v. Yale, 45 N. Y. Supp. 622.....	279
Beekman v. Bonsor, 23 N. Y. 298.....	41, 43, 101, 160, 169, 279
Beekman v. People, 27 Barb. 260.....	285
Beers v. Grant, 110 App. Div. 152; 185 N. Y. 533.....	42
Bell v. Hepworth, 134 N. Y. 442.....	81
Belmont v. O'Brien, 12 N. Y. 394.....	19, 20, 21, 22, 27, 28, 101, 109, 144, 145
Bender v. Paulus, 197 N. Y. 369.....	108
Benedict v. Dunning, 110 App. Div. 303.....	43
Benedict v. Webb, 98 N. Y. 460.....	39, 46, 47, 293
Bennett v. Chapin, 77 Mich. 526.....	156, 354
Bennett v. Garlock, 79 N. Y. 302.....	107, 144, 231
Bennett v. Rosenthal, 11 Daly, 91.....	267
Bensel, Matter of, 70 Misc. 279.....	64
Benson, Matter of, 96 N. Y. 499.....	312
Benson v. Corbin, 145 N. Y. 351.....	310, 344
Bergmann v. Lord, 194 N. Y. 70.....	32, 106, 116, 265, 267, 271
Bertles v. Noonan, 92 N. Y. 152.....	4
Betts v. Betts, 4 Abb. N. C. 317.....	19
Beurhaus v. Cole, 94 Wis. 617.....	355, 356
Bevan v. Cooper, 72 N. Y. 317.....	67
Bevins v. Riley, 24 Week. Dig. 35.....	45
Bindrim v. Ullrich, 64 App. Div. 444; 173 N. Y. 587.....	41
Bingham, Matter of, 127 N. Y. 426.....	287
Bingham v. Jones, 25 Hun, 6.....	64, 67
Bird v. Merkle, 144 N. Y. 544.....	280, 284

TABLE OF CASES.

xix

(References are to pages.)

Bird v. Pickford, 141 N. Y. 18.....	60
Birdsall v. Grant, 37 App. Div. 348.....	96
Bishop v. Bishop, 4 Hill, 138.....	140
Bisson v. W. S. R. R. Co., 143 N. Y. 125.....	94, 248, 339
Blanchard v. Blanchard, 4 Hun, 287; 70 N. Y. 615....	19, 70, 76, 156, 169
Blanchard v. Blanchard, 1 All. 223....	314
Blauvelt, Matter of, 131 N. Y. 249	147
Blight v. Hartnoll, 19 Ch. Div. 294..	198
Bliven v. Robinson, 83 Hun, 208; 152 N. Y. 333.....	25
Bliven v. Seymour, 88 N. Y. 469...70, 76, 127, 175, 259, 265, 270, 274,	342
Blood v. Kane, 130 N. Y. 514.....	272
Boardman v. Hitchcock, 136 App. Div. 253; 202 N. Y. (Mem.)....	285
Bogert v. Hertell, 4 Hill, 492.....	288
Bolton v. Jacks, 6 Robt. 166... ..	132, 292
Booker v. Booker, 119 App. Div. 482.....	79
Booth v. Baptist Church, 126 N. Y. 215... ..41, 95, 102, 219, 280,	312
Bork v. Martin, 132 N. Y. 280....	266
Bostwick, Matter of, 160 N. Y. 489.....	28
Bowditch v. Ayrault, 138 N. Y. 222.....248, 263, 265, 311, 313, 342, 346	
Bowen v. Sweeney, 89 Hun, 359; 154 N. Y. 780.....	25
Bowers, Matter of, 109 App. Div. 566; 184 N. Y. 574.	312
Bowers v. Beekman, 16 Hun, 268.....	224
Bowman v. Domestic & Foreign M. Soc'y, 100 App. Div. 29; 182 N. Y. 494.....	284
Boynton v. Hoyt, 1 Den. 53.....	48, 128
Bradhurst v. Bradhurst, 1 Pai. 331.....	126
Bradhurst v. Field, 135 N. Y. 564.....	310
Bramhall & Ferris, 14 N. Y. 41.....21, 24, 31, 32	
Brandreth, Matter of, 169 N. Y. 437.....85, 265, 272, 342, 346	
Brandt v. Brandt, 13 Misc. 431.....	41
Bray, Matter of, 118 App. Div. 533.....	76, 230, 256
Brearley School v. Ward, 201 N. Y. 358.....23, 31, 32, 33, 36, 108, 116	
Bremer v. Penniman, 72 N. Y. 603.....21, 22, 261, 266	
Brennan v. Willson, 71 N. Y. 502.....	107
Brevoort v. Brevoort, 70 N. Y. 126	23
Brevoort v. Grace, 53 N. Y. 245.....	23
Brewer v. Brewer, 11 Hun, 147; 72 N. Y. 603.....21, 22, 261, 266	
Brewster v. Striker, 2 N. Y. 19.....101, 231	
Bridge v. Ward, 35 Wis. 687.....80, 355	
Briggs v. Davis, 21 N. Y. 574.....107, 231, 236	
Brooklyn, City of, v. Seaman, 30 Misc. 507	60, 61
Broughton v. Jones, 1 Colby Ch. R. 26	57
Brown, Matter of, 154 N. Y. 313....67, 71, 73, 86, 105, 146, 162, 166, 231, 247, 248, 259, 261, 277, 278, 313, 342	
Brown, Matter of, 29 Hun, 412; 93 N. Y. 295....	87, 324
Brown v. Barker, 68 App. Div. 592.....	32
Brown v. Brown, 54 App. Div. 6.....	78

(References are to pages.)

Brown v. Evans, 34 Barb. 594.....	45, 50, 57, 95, 211, 219, 303
Brown v. Mutual Trust Co., 22 Week. Dig. 395.....	82, 256, 270
Brown v. Quintard, 177 N. Y. 75....	42, 46, 61, 67, 111, 125, 131, 139, 290, 292
Brown v. Richter, 76 Hun, 469; 144 N. Y. 706.....	67, 69, 291, 293, 307
Brown v. Richter, 25 App. Div. 239.....	105
Brown v. Spohr, 87 App. Div. 522; 180 N. Y. 201.....	28, 100, 266
Brown v. Wadsworth, 168 N. Y. 225.....	320
Bruchaeser, Matter of, 49 Misc. 194.....	54, 291
Bruner v. Meigs, 6 Hun, 203; 64 N. Y. 506.....	64, 149, 167
Bryan v. Knickerbacker, 1 Barb. Ch. 409.....	131
Buchanan v. Little, 154 N. Y. 147....	126, 144, 292
Buchanan v. Tebbetts, 69 Hun, 81.....	158, 169
Buchner, Matter of, 60 Misc. 287.....	64, 291, 295
Buel v. Southwick, 70 N. Y. 581.....	344, 345
Bulkley v. DePeyster, 26 Wend. 21.....	67
Bunnell v. Gardner, 4 App. Div. 321.....	32
Burke v. O'Brien, 115 App. Div. 574.....	256
Burke v. Valentine, 52 Barb. 412; 6 Alb. L. J. 167.....	48, 49, 346
Burns v. Allen, 89 Hun, 552; 154 N. Y. 741.....	102
Burrill v. Boardman, 43 N. Y. 254.....	95, 280
Burrill v. Sheil, 2 Barb. 457.....	248
Butler v. Baudouine, 84 App. Div. 215; 177 N. Y. 530.....	32
Butler v. Butler, Hoffman Ch. 344; 3 Barb. Ch. 304....	45, 47, 50, 54, 71, 211, 229, 248, 309
Butterfield, Matter of, 133 N. Y. 473....	42, 46, 50, 75, 107, 151, 153, 169, 170, 290
Button v. Hemmens, 92 App. Div. 40.....	20, 26
Byrnes v. Labagh, 38 Hun, 453. See Byrnes v. Stilwell.	
Byrnes v. Stilwell, 103 N. Y. 453.....	86, 88, 248
C. W. Co. v. Hodenpyl, 135 N. Y. 430.....	82
Cabble v. Cabble, 111 App. Div. 426.....	272
Cadell v. Palmer, 7 Bligh, N. S. 202.....	180
Cady v. S. W. W. Co., 134 N. Y. 115.....	97
Cahill v. Russell, 140 N. Y. 402.....	149
Caldwell, Matter of, 188 N. Y. 115.....	287
Campbell v. Beaumont, 91 N. Y. 464.....	175
Campbell v. Foster, 35 N. Y. 361.....	268
Campbell v. Rawdon, 18 N. Y. 412.....	70, 324
Campbell v. Stokes, 142 N. Y. 23....	23, 67, 91, 94, 105, 166, 167, 247, 248
Carmichael v. Carmichael, 1 Abb. Ct. App. Dec. 309.....	332, 340
Carnwright v. Gray, 127 N. Y. 92.....	82
Carpenter, Matter of, 131 N. Y. 86.....	266, 348
Case v. Green, 78 Mich. 540.....	354
Casgrain v. Hammond, 134 Mich. 419.....	354
Catt v. Catt, 118 App. Div. 742.....	283

TABLE OF CASES.
(References are to pages.)

xxi

Central Trust Co. v. Egleston, 185 N. Y. 23.....	67, 290, 309
Chamberlain v. Chamberlain, 43 N. Y. 424.....	280, 285, 348, 349, 350, 351, 353
Chamberlain v. Taylor, 105 N. Y. 185.....	149, 288
Chanler v. N. Y. El. R. R. Co., 34 App. Div. 305	19, 277
Chapman, Matter of, 133 App. Div. 337; 196 N. Y. 561.....	39, 154
Chapman v. Moulton, 8 App. Div. 64.....	344
Charlier, Matter of, 22 App. Div. 71.....	67
Chastain v. Dickinson, 201 N. Y. 538.....	291
Chester v. Jumel, 125 N. Y. 237.....	90
Child v. Child, 1 N. Y. Leg. Obs. 182.....	140
Chinn v. Keith, 4 T. & C. 126. (See Chism v. Keith).	
Chipman v. Montgomery, 63 N. Y. 221.....	293
Chism v. Keith, 1 Hun, 589.	323
Christie, Matter of, 59 Hun, 153; 133 N. Y. 473.....	107, 151, 153, 169
Church of Redemption v. Grace Church, 68 N. Y. 570.....	281
Chwatal v. Schreiner, 148 N. Y. 683.....	244, 309, 310
City of Brooklyn v. Seaman. See Brooklyn.	
City of Owatonna v. Rosebrock. See Owatonna.	
City of Rochester, Matter of. See Rochester.	
Clancy v. O'Gara, 4 Abb. N. C. 258.....	346
Clark v. Cammann, 160 N. Y. 315.....	272, 313, 341
Clark v. Clark, 147 N. Y. 639.....	102, 144, 266
Clark v. Goodridge, 51 Misc. 140.....	59, 62, 295
Clark v. Kittenplan, 63 Misc. 122.....	244
Clarke, Matter of, 59 Hun, 557; 128 N. Y. 658.....	103
Clay v. Wood, 153 N. Y. 134.	102, 310
Clemens v. Clemens, 60 Barb. 366; 37 N. Y. 59.....	291, 293
Clift v. Moses, 116 N. Y. 144.....	287, 288
Close v. Farmers' L. & T. Co., 195 N. Y. 92....	101, 102, 309, 310, 312, 356
Clute v. Bool, 8 Pai. 83.....	126, 137
Coann v. Culver, 188 N. Y. 9.....	149, 287
Cochraue v. Alexander, 56 Misc. 212.....	131
Cochrane v. Schell, 140 N. Y. 516....	88, 90, 91, 93, 94, 95, 100, 101, 104, 110, 115, 125, 126, 128, 130, 136, 145, 146, 259, 260, 266, 267, 268, 271, 291, 309, 310
Colby v. Doty, 158 N. Y. 323.....	344
Cole v. Lee, 143 Mich. 267.....	354
Cole v. Sewell, 4 Dr. & Warr. 1.....	181
Coleman v. Beach, 97 N. Y. 545.....	163, 175
Collins, Matter of, 144 N. Y. 522.....	126
Colt v. Heard, 10 Hun, 189.....	175
Colton v. Fox, 6 Hun, 49; 67 N. Y. 348.....	41, 67, 68, 291, 309
Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430	82
Comm. v. Hartnett, 3 Gray, 450.....	137
Congdon v. Lee, 3 Edw. Ch. 304.....	32
Conger, Matter of, 81 App. Div. 493.....	56, 220, 222, 231, 232, 259

(References are to pages.)

Conkling v. Davies, 14 Abb. N. C. 499.	59
Connolly v. O'Brien, 166 N. Y. 406.	311, 312, 316
Connolly v. Connolly, 122 App. Div. 492.	33, 106
Converse v. Kellogg, 7 Barb. 590.	270
Cook v. Barr, 44 N. Y. 156.	59
Cook v. Lowry, 95 N. Y. 103.	128, 131, 146, 258, 260, 268, 278
Cooke v. Platt, 98 N. Y. 35.	101, 107, 110, 149
Cooksey, Matter of, 182 N. Y. 92.	154, 259, 261, 278
Coolidge, Matter of, 85 App. Div. 295; 177 N. Y. 541.	287
Cooney, Matter of, 112 App. Div. 659; 115 App. Div. 895; 187 N. Y. 546.	285
Cooper v. Heatherington, 65 App. Div. 561.	48
Corley v. McElmeel, 149 N. Y. 228.	25
Cornell, Matter of, 170 N. Y. 423.	267
Corse v. Chapman, 153 N. Y. 466.	60, 64, 67, 69, 86, 87, 144, 149, 311
Corse v. Corse, 144 N. Y. 569.	67, 71, 118, 125
Coster v. Lorillard, 14 Wend. 265.	35, 36, 70, 75, 126, 137, 291, 323, 328
Coston v. Coston, 118 App. Div. 1.	39, 48, 49, 50
Cottman v. Grace, 112 N. Y. 299.	279, 280, 287, 309
Cotton v. Berkelman, 142 N. Y. 160.	308
Cowen v. Rinaldo, 82 Hun. 479.	42, 120, 122, 126, 129, 293
Craig v. Craig, 3 Barb. Ch. 76.	24, 128, 129
Craig v. Hone, 2 Edw. Ch. 554.	57, 137
Craig v. Wells, 11 N. Y. 315.	78, 79
Crain v. Wright, 114 N. Y. 307.	175
Cramer, Matter of, 170 N. Y. 271.	86, 87, 88, 344
Crane, Matter of, 164 N. Y. 71.	248, 312, 336, 340, 341, 342, 343
Crittenden v. Fairchild, 41 N. Y. 289.	80, 149
Cromek v. Lumb, 2 Y. & C. C. C. 565.	304
Cromwell v. Cromwell, 2 Edw. Ch. 495; 3 Ch. Sentinel 7.	71
Crooke v. County of Kings, 97 N. Y. 421.	27, 35, 36, 43, 45, 59, 71, 73, 106, 111, 134, 141, 142, 175, 309
Crooke v. Prince, decided with Crook v. County of Kings.	
Cross v. U. S. Trust Co., 131 N. Y. 330.	349, 350, 351, 353
Crossman, Matter of, 113 N. Y. 503.	259, 268
Crozier v. Bray, 120 N. Y. 366.	175, 311
Cruger v. Douglas, 4 Edw. Ch. 433; 5 Barb. 225.	100
Cruger v. Jones, 18 Barb. 467.	109, 111
Cruikshank v. Home for the Friendless, 113 N. Y. 337.	19, 21, 42, 280
Culross v. Gibbons, 130 N. Y. 447.	25, 107, 291
Cunningham v. Davenport, 147 N. Y. 43.	267
Curtis, Matter of, 142 N. Y. 219.	89, 90, 91
Curtis v. Fowler, 66 Mich. 698.	91
Curtis v. Leavitt, 15 N. Y. 9.	32
Curtis v. Lukin, 5 Beav. 147.	77
Curtis v. Moore, 152 N. Y. 159.	102
Curtis v. Murphy, 129 N. Y. 645.	91

TABLE OF CASES.

xxiii

(References are to pages.)

Curtiss v. Ayrault, 47 N. Y. 73.....	97
Cushman v. Cushman, 116 App. Div. 763; 191 N. Y. 505	28, 336, 340
Cushman v. Horton, 59 N. Y. 149.....	324
Cussack v. Tweedy, 126 N. Y. 81.....	71, 149, 156
Cuthbert v. Chauvet, 136 N. Y. 326.....	26
Cutter v. Doughty, 23 Wend. 513, rev'd 7 Hill, 305.....	343
Cutting v. Cutting, 86 N. Y. 522.....	4, 147, 149, 175, 258, 260, 278
Dammert v. Osborn, 140 N. Y. 30; 141 N. Y. 564.....	283, 348, 349, 350, 351, 352, 353
Dana v. Murray, 122 N. Y. 604	69, 73, 75, 94, 149, 161, 162, 163, 167, 172, 203, 222, 223, 247, 290, 305, 306, 313
Danforth v. Oshkosh, 119 Wis. 262	355, 356
Darling v. Rogers, 22 Wend. 483	5, 291, 292
Darrow v. Calkins, 154 N. Y. 503	102
Davies v. Davies, 129 App. Div. 379; 197 N. Y. 598.	244
Davis, Matter of, 149 N. Y. 539.....	91
Davis v. Davis, 75 N. Y. 221.....	138
Davis v. Davis, 118 N. Y. 411.....	344
Davis v. Kerr, 30 App. Div. 322	51
Dean v. Mumford, 103 Mich. 510	354, 355
Dearing v. McKimmon D. & H. Co., 165 N. Y. 78.....	348
DeBarante v. Gott, 6 Barb. 492	17, 57
Deegan v. Wade, 144 N. Y. 573	19, 78, 147, 175, 277
Defreese v. Lake, 109 Mich. 415	354
DeGrauw v. Long Island El. R. Co., 43 App. Div. 502; 163 N. Y. 597.....	138
DeGraw v. Clason, 11 Pai. 136.....	32, 126
DeKay v. Irving, 5 Den. 646.....	41, 46, 59, 100, 101, 296, 301
Delafield v. Barlow, 107 N. Y. 535.....	288
Delafield v. Shipman, 103 N. Y. 463	71, 146, 162, 231, 248, 339, 341, 346
Delaney v. McCormick, 88 N. Y. 174.....	94, 162, 248, 341, 345, 347
Delaney v. Valentine, 154 N. Y. 692.....	32
Delano, Matter of, 176 N. Y. 486.....	154
Dempsey v. Tylee, 3 Duer. 73.....	17
Denike v. Harris, 84 N. Y. 89.....	100
Denison v. Denison, 96 App. Div. 418; 183 N. Y. 505.....	72, 91, 93, 339
Denison v. Denison, 185 N. Y. 438.....	67, 309
Denton, Matter of, 137 N. Y. 428.....	344
Denton, Matter of, 102 N. Y. 200.....	265
DePeyster v. Beekman, 55 How. Pr. 90.....	59
DePeyster v. Clendining, 8 Pai. 295; 26 Wend. 21.....	140, 291
DePeyster v. Michael, 6 N. Y. 467.....	78, 80, 96
DeReycke, Matter of, 99 App. Div. 596.....	102
Despard v. Churchill, 53 N. Y. 192.....	351, 352, 353
Devoe v. Lutz, 133 App. Div. 356.....	266

(References are to pages.)

Dewey, Matter of, 153 N. Y. 63.....	101, 127
Dewitt, Matter of, 113 App. Div. 790; 188 N. Y. 567....	42, 285, 290, 312
DeWolf v. Lawson, 61 Wis. 469.....	41, 355, 356
Dexter v. Watson, 54 Misc. 484.....	59, 129
Dey Ermand, Matter of, 24 Hun. 1.....	131, 146
Dickie v. VanVleck, 5 Redf. 284.....	67
Dillaye v. Greenough, 45 N. Y. 438.....	101
Dillenbeck v. Dillenbeck, 134 App. Div. 720.....	19
Dimmick v. Patterson, 142 N. Y. 322.....	312, 342
Dippel, Matter of, 71 App. Div. 598.....	49, 50
Disney, Matter of, 190 N. Y. 128.....	344
Dittmar v. Gould, 60 App. Div. 94.....	32
Doane v. Mercantile Trust Co., 160 N. Y. 494....	85, 106, 267, 287
Dodge v. Stevens, 105 N. Y. 585.....	91
Dodge v. Williams, 46 Wis. 70.....	280, 355, 356
Dodsworth v. Dam, 38 Misc. 684.....	41
Doe dem. Long v. Prigg, 8 B. & C. 231.....	343
Donaldson v. Am. Tract Society, 1 T. & C. Addenda, 15.....	41
Donovan v. VanDeMark, 78 N. Y. 244.....	101
Doscher v. Wyckoff, 132 App. Div. 139.....	89, 111
Doubleday v. Newton, 27 Barb. 431.....	309
Dougherty v. Thompson, 167 N. Y. 472....	90, 93, 166, 311, 312, 339, 341, 342, 346
Douglas v. Cruger, 80 N. Y. 15.....	25, 26, 32, 43, 99, 104, 105, 111, 113, 267
Douglass v. Douglass, 70 Misc. 412.....	17
Downing v. Birney, 117 Mich. 675.....	354
Downing v. Marshall, 1 Abb. Ct. App. Dec. 524....	288
Downing v. Marshall, 23 N. Y. 366.....	5, 45, 101, 279, 280
Dows, Matter of, 167 N. Y. 227.....	63, 154
Drake v. Lawrence, 19 Hun. 112.....	324
Drake v. Paige, 127 N. Y. 562.....	149
Drake v. Pell, 4 Edw. Ch. 251.....	49, 95, 341
Draper v. Palmer, 27 State Rep. 510.....	132
Dresser v. Travis, 39 Misc. 358; 87 App. Div. 632.....	41, 120, 129, 291
Driscoll v. Hewlett, 198 N. Y. 297.....	285
DuBois v. Ray, 35 N. Y. 162.....	86, 309, 310, 346
Duclos v. Benner, 136 N. Y. 560.....	71
Duke of Cumberland v. Graves, 9 Barb. 595.....	17
Dunklee v. Butler, 28 App. Div. 99.....	69, 307
Dungannon v. Smith, 12 Cl. & F. 546.....	39
Dunham v. Deraismes, 165 N. Y. 65.....	126, 144
Dupré v. Thompson, 4 Barb. 279; 8 Barb. 538.....	291, 292
Durand, Matter of, 194 N. Y. 477.....	63, 280, 285
Durfee v. Pomeroy, 154 N. Y. 583.....	51, 67, 71, 76, 156
Duvall v. English E. L. Church, 53 N. Y. 500.....	107, 231, 247

TABLE OF CASES.

xxv

(References are to pages.)

Dwight v. Lawrence, 111 App. Div. 616.....	23
Dyett v. C. T. Co., 140 N. Y. 54.....	104
East Norway Lake Church v. Froislie, 37 Minn. 447..	355
Ebling v. Dreyer, 149 N. Y. 460.....	23
Edson v. Bartow, 154 N. Y. 199.....	102
Eells v. Lynch, 8 Bosw. 465	39, 49
Eggleston v. Swartz, 129 N. W. Rep. 48.....	355
Eldridge, Matter of, 29 Misc. 734; 62 Supp. 1026.....	228
Ellison v. Miller, 11 Barb. 332.....	140
Embree, Matter of, 9 App. Div. 602; 154 N. Y. 778.....	248, 343
Embury v. Sheldon, 68 N. Y. 227.....	105, 106, 145, 311, 344
Emmons v. Cairns, 3 Barb. 243.....	17, 18, 60, 256
Endress v. Willey, 122 App. Div. 110; 197 N. Y. 541.....	129
Erwin v. Loper, 43 N. Y. 521.....	288
Everett v. Peyton, 167 N. Y. 117.....	25, 32
Everitt v. Everitt, 29 N. Y. 39 ...	17, 18, 24, 56, 64, 67, 68, 69, 70, 75, 76, 102, 111, 150, 151, 152, 156, 235, 261, 266, 267, 287, 311, 341, 342
Evers v. Challis, 18 Q. B. 224; 7 H. L. C. 531.....	304
Ewen, Matter of, 7 Misc. 619.....	306
Fadness v. Braunborg, 73 Wis. 257.....	356
Faile, Matter of, 44 Misc. 619.....	42
Fairchild v. Edson, 154 N. Y. 199.....	41, 279, 281, 285
Fargo v. Squiers, 154 N. Y. 250	38, 40, 102, 149, 156, 164, 172, 173, 174, 208, 258, 259, 261, 278
Farleigh v. Cadman, 159 N. Y. 169.	267
Farmers' Loan & Trust Co., Matter of, 65 Misc. 418.....	35
Farmers' Loan & Trust Co. v. Bostwick, 190 N. Y. 569, rev'g 120 App. Div. 271.	63
Farmers' Loan & Trust Co. v. Cummings, 108 N. Y. Supp. 882.....	40
Farmers' Loan & Trust Co. v. Kip, 192 N. Y. 266.....	4, 32, 35, 36, 63, 111, 149, 164, 172, 175
Farmers' Loan & Trust Co. v. Shaw, 127 App. Div. 656.....	285
Farrand v. Petit, 84 Mich. 671.....	41, 354
Farrar v. McCue, 89 N. Y. 139.....	17
Farrell, Matter of, 133 App. Div. 97; 198 N. Y. 579.....	108
Felter v. Ackerson, 35 App. Div. 282.....	43
Fenton v. Fenton, 35 Misc. 479.....	71
Ferris v. Gibson, 4 Edw. Ch. 707.....	343
Ferry v. Sampson, 112 N. Y. 415.....	310
Field v. Field's Ex'rs, 4 Sandf. Ch. 528.....	48, 291
Finch v. Wilkes, 17 Misc. 428.....	60, 61
Finley v. Bent, 95 N. Y. 364.....	346
First Nat'l Bank v. Nat. Broadway Bank, 156 N. Y. 459.....	350
First Presb. Soc., Matter of, 106 N. Y. 251.....	280
Fisher, Matter of, See Mead, Matter of.....	40

(References are to pages.)

Fisher v. Banta, 66 N. Y. 468	287, 288
Fisher v. Hall, 41 N. Y. 416	102
Fisher v. Langlotz, 100 N. Y. Supp. 578	64
FitzGerald v. City of Big Rapids, 123 Mich. 281	354, 355
Fitzgerald v. Topping, 48 N. Y. 438	109, 111, 267
Flaherty v. Adelman, 138 Wis. 120	355
Floyd v. Carow, 88 N. Y. 560.	85, 209
Floyd v. Smith, 140 N. Y. 337	162
Foote v. Bruggerhof, 66 Hun. 406	67, 76, 156
Foote v. Bryant, 47 N. Y. 544	281
Ford v. Ford, 70 Wis. 19	355
Ford v. Ford, 80 Mich. 42	348, 354
Forster v. Winfield, 142 N. Y. 327	102
Forsyth v. Rathbone, 34 Barb. 388.	52, 94, 131, 309
Foster v. Stevens, 146 Mich. 131	354
Fountain v. Ravenel, 17 How. (U. S.) 369	281
Fowler v. Coates, 201 N. Y. 257	96, 209
Fowler v. Depau, 26 Barb. 224	53, 294, 296
Fowler v. Ingersoll, 127 N. Y. 472.	17, 23, 26, 41, 67, 69, 208, 234, 343
Fox, Matter of, 52 N. Y. 530.	280
Fralick v. Lyford, 107 App. Div. 543; 187 N. Y. 524	285
Franklin v. Minertzhagen, 39 App. Div. 555	59, 231
Fraser v. Trustees, 124 N. Y. 479.	288
Frazer, Matter of, 92 N. Y. 239	292
Frazer v. Hognuet, 65 App. Div. 192	60, 72, 111, 141
Freeborn v. Wagner, 2 Abb. Ct. App. Dec. 175	175
French v. Carhart, 1 N. Y. 96	308
Fuller, Will of, 75 Wis. 431	279, 356
Gage v. Gage, 43 Hun. 501; 112 N. Y. 667	68, 70
Galway v. Brice, 10 Misc. 255	39, 76
Gano v. McCann, 56 How. Pr. 337	102
Gantert, Matter of, 136 N. Y. 106	73, 149
Gardner, Matter of, 140 N. Y. 122	102, 175, 213, 342
Garland v. Garland, 35 Misc. 147	291
Garnsey v. Mundy, 24 N. J. Eq. 243	59
Garvey v. McDavitt, 72 N. Y. 556.	17, 18, 44, 110, 111, 149, 157, 158, 160, 163, 273
Gehrig, Matter of, 44 Alb. L. J. 108. (See Huss, Matter of)	
Genet v. Beekman, 45 Barb. 382	32
Genet v. Hunt, 113 N. Y. 158.	17, 23, 26, 31, 63, 94, 102, 105, 163, 164, 172, 173, 174, 213, 231, 259, 260, 266, 267, 268, 296, 301
Geofroy v. Riggs, 133 U. S. 258	17
German Land Ass'n v. Scholler, 10 Minn. 331	356
Gibert v. Peteler, 38 N. Y. 165	96

TABLE OF CASES.

xxvii

(References are to pages.)

Gibson v. Walker, 20 N. Y. 476.....	344
Gilbert v. Taylor, 148 N. Y. 298.....	127
Gilliam v. Guaranty Trust Co., 186 N. Y. 127.....	91, 248, 339
Gilman v. Gilman, 111 N. Y. 265.	292
Gilman v. Healy, 1 Dem. 404.....	129, 131, 132
Gilman v. McArdle, 99 N. Y. 451.....	32, 102, 266, 267
Gilman v. Reddington, 24 N. Y. 9 ...	45, 71, 72, 76, 86, 105, 131, 166, 167, 232, 254, 260, 266, 267, 268, 271, 342
Giraud v. Giraud, 58 How. Pr. 175.....	41
Goebel v. Wolf, 113 N. Y. 405.....	71, 88, 105, 131, 132, 162, 166, 247, 341, 342
Goodell v. Hibbard, 32 Mich. 47	345, 354
Goodrich v. Milwaukee, 24 Wis. 422.....	355
Goodwin v. Coddington, 154 N. Y. 283, ...	310, 311, 312
Gorden, Matter of, 172 N. Y. 25.....	292, 312
Gosling v. Gosling, Johns. (Eng.) 265.....	77
Gott v. Cook, 7 Pai. 521; 24 Wend. 641.....	48, 57, 86, 126, 137, 268
Gould v. Rutherford, 6 Misc. 72; 79 Hun, 280.....	146
Gould v. Taylor Orphan Asylum, 46 Wis. 106.....	356
Gourley v. Campbell, 66 N. Y. 169.....	288
Govin v. de Miranda, 140 N. Y. 474; 662... ..	100
Graff v. Bonnett, 31 N. Y. 9.....	32, 258, 260, 268
Graham v. Fountain, 2 N. Y. Supp. 598.....	94
Graham v. Graham, 49 Misc. 4.....	39, 222, 307
Grant v. Grant, 3 Y. & C. 171	77
Graves, Matter of, 171 N. Y. 40.....	285
Graves v. Deterling, 120 N. Y. 447.....	89
Green, Matter of, 153 N. Y. 223.....	346
Greene v. Greene, 125 N. Y. 506.....	78, 79, 100, 108, 293
Greenland v. Waddell, 116 N. Y. 234....	17, 44, 50, 55, 101, 149, 157, 203, 236, 237, 248, 251, 254, 259, 263, 272, 287, 288, 341
Greyston v. Clark, 41 Hun, 125.....	175
Griffen v. Ford, 1 Bosw. 123.....	39, 126
Griffin, Matter of, 167 N. Y. 71.....	280, 281, 283, 284
Griffin v. Shepard, 124 N. Y. 70.....	88, 90, 93, 220, 333, 339
Grout v. Van Schoonhoven, 1 Sandf. Ch. 336.....	291
Guental v. Guental, 113 App. Div. 310.....	42, 102, 108
Guernsey v. Guernsey, 36 N. Y. 267.....	344
Guernsey v. Van Riper, 126 App. Div. 368.....	94
Haendle v. Stewart, 84 App. Div. 275.....	108
Hafner v. Hafner, 62 App. Div. 316; 171 N. Y. 633.....	120, 129, 290
Hagemeyer v. Saulpaugh, 97 App. Div. 535.....	21, 48, 160, 277
Hagerty v. Hagerty, 9 Hun, 175.....	101, 103, 266, 267
Haggerty, Matter of, 128 App. Div. 479; 194 N. Y. 550.....	154
Hakes v. Peck, 30 How. Pr. 104.....	138
Hale v. Hale, 3 Ch. D. 643....	39

(References are to pages.)

Haley v. Sheridan, 190 N. Y. 331.....	17
Hall v. Hall, 81 N. Y. 130.....	17
Hall v. La France Fire Engine Co., 158 N. Y. 570....	335, 340
Hallett v. Thompson, 5 Pai. 583.....	32
Halsey v. Jewett Dramatic Co., 114 App. Div. 420; rev'd 190 N. Y. 231.....	138
Ham v. Van Orden, 84 N. Y. 257	87, 91, 260, 262, 265
Hannan v. Osborn, 4 Pai. 336	57, 88, 91
Harbeck, Matter of, 161 N. Y. 211.....	172, 173
Hardenbergh v. McCarthy, 130 App. Div. 538.....	64, 307
Harrington, Will of, 142 Wis. 447	355
Harrington v. Abberton, 115 App. Div. 177.....	108
Harrington v. Pier, 105 Wis. 485.....	356
Harris v. Am. Bible Soc., 2 Abb. Ct. App. Dec. 316.....	285
Harris v. Clark, 7 N. Y. 242.....	21, 97, 128, 131, 290, 293
Harris v. Fly, 7 Pai. 221.....	287
Harris v. Strodl, 132 N. Y. 392.....	22, 168
Harrison v. Harrison, 36 N. Y. 543.....	71, 72, 143, 291, 292
Hart, Matter of, 61 App. Div. 587; 168 N. Y. 640....	63, 96
Harteau, Matter of, 125 App. Div. 710; 196 N. Y. 513.....	129, 146, 291
Hartung v. Witte, 59 Wis. 285.....	80, 355
Harvey v. Brisbin, 50 Hun, 376; 143 N. Y. 151.....	44, 144
Hasbrouck v. Knoblauch, 130 App. Div. 378.....	175
Hascall v. King, 162 N. Y. 134..104, 110, 115, 120, 121, 122, 124, 125, 126, 129, 291	
Hatch v. Bassett, 52 N. Y. 359.....	287, 346, 347
Hatfield v. Sneden, 54 N. Y. 280.....	220
Hathaway v. Hathaway, 37 N. Y. 265.....	101
Hauenstein v. Lynham, 100 U. S. 483.....	17
Haug v. Schumacher, 166 N. Y. 506..41, 101, 129, 130, 131, 162, 169, 170, 248, 256, 291, 309, 312, 313, 342, 343	
Haux v. Dry Dock Savings Inst., 2 App. Div. 165; 154 N. Y. 736...	267
Haviland v. Willets, 141 N. Y. 35	25
Hawley v. James, 5 Pai. 318; 7 Pai. 213; 16 Wend. 61....4, 5, 15, 21, 22, 39, 40, 42, 43, 46, 50, 55, 57, 73, 75, 76, 86, 96, 101, 112, 121, 122, 126, 129, 137, 156, 170, 211, 229, 291	
Haxtun v. Corse, 2 Barb. Ch. 506.....	45, 71, 100, 130
Hayden, Matter of, 77 Hun, 219.....	128
Hayden v. Sugden, 48 Misc. 108.....	17, 21
Haynes v. Sherman, 117 N. Y. 433....19, 21, 22, 48, 57, 92, 94, 175, 261, 266, 290	
Heard v. Horton, 1 Den. 165.....	324
Heath v. Hewitt, 127 N. Y. 166.....	308, 310, 324
Heermans v. Burt, 78 N. Y. 259.....	100, 107, 110, 144
Heermans v. Robertson, 64 N. Y. 332.....	19, 21, 102, 107
Hegeman v. Moon, 131 N. Y. 462.....	82
Heiss v. Murphey, 40 Wis. 276.....	356

TABLE OF CASES.

xxix

(References are to pages.)

Helck v. Reinheimer, 105 N. Y. 470.....	86, 102
Henderson v. Henderson, 113 N. Y. 1.....	19, 20, 22, 40, 41, 57, 76, 86, 88, 110, 149, 156, 162, 203, 208, 230, 242, 243, 245, 246, 248, 249, 273, 277, 291, 345, 346
Henderson v. Merritt, 10 App. Div. 397....	311
Hendricks v. Hendricks, 3 App. Div. 604; 154 N. Y. 751.....	129
Hennessy v. Patterson, 85 N. Y. 91....	87, 91, 331, 332, 333, 334, 335, 337, 340
Herrick, Matter of, 32 State Rep. 1032.....	291
Herriot v. Prime, 155 N. Y. 5.....	86, 292
Hersee v. Simpson, 154 N. Y. 496	94, 311
Herzig v. Herzig, 140 App. Div. 514.....	120
Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86.....	42, 57, 94, 111, 125, 139, 145, 248, 290, 303, 309, 312, 341
Hetzel v. Barber, 69 N. Y. 1	44, 78, 157, 168, 169, 288
Hickok v. Bunting, 67 App. Div. 560.....	101
Higgins v. Downs, 101 App. Div. 119.....	27, 101
Hill v. Miller, 3 Pal. 254	97
Hillen v. Iselin, 144 N. Y. 365.....	73, 95, 163, 164, 169, 172, 308, 310, 339
Hillyer v. Vandewater, 24 N. E. Rep. 999; 121 N. Y. 681.....	71
Hilton v. Hilton, L. R. 14 Eq. 468.....	77
Hirsch v. Auer, 146 N. Y. 13.....	266
Hobson v. Hale, 95 N. Y. 588.....	21, 22, 41, 94, 131, 248, 287, 288, 348
Hockley v. Mawbey, 1 Ves. 150.....	163
Hoey v. Kenny, 25 Barb. 396.....	17
Hoffman, Matter of, 65 Misc. 126; 140 App. Div. 122; 201 N. Y. 247, 39, 64, 70, 248, 295, 308, 310, 312	
Hoffman, Matter of, 143 N. Y. 327.....	91
Holden v. Rush, 119 App. Div. 716.....	79, 80
Holland v. Alcock, 108 N. Y. 312.....	279, 280, 281
Hollis v. Drew Theo. Sem., 95 N. Y. 166.....	285
Holly v. Hirsch, 135 N. Y. 590.....	100, 101, 308
Holmes v. Mead, 52 N. Y. 332.....	279, 290, 291, 293
Holmes v. Walter, 118 Wis. 409.....	355
Hone's Ex'rs v. Van Schaick, 7 Pal. 221; 20 Wend. 564....	41, 67, 73, 137, 162, 163, 170, 208, 229, 254, 263
Hood v. Hood, 85 N. Y. 561.....	287
Hooker v. Hooker, 41 App. Div. 235; 166 N. Y. 156.....	15, 140, 266, 292
Hope v. Brewer, 136 N. Y. 126.....	19, 273, 277, 287, 349, 350, 351, 353
Hopkins v. Kent, 145 N. Y. 363.....	43, 101, 106
Hoppock v. Tucker, 59 N. Y. 203.....	310
Horndorf v. Horndorf, 13 Misc. 343.....	76
Horner v. Chicago, etc., Co., 38 Wis. 165	96
Horstman v. Flege, 172 N. Y. 381.....	126, 292, 312
Horton v. Cantwell, 108 N. Y. 255.....	129, 267
Hoskin v. Long Island Loan & Trust Co., 139 App. Div. 258.....	268
House v. Jackson, 50 N. Y. 161.....	323, 326

(References are to pages.)

House v. McCormick, 57 N. Y. 310	323
Howard v. Leonard, 3 App. Div. 277.....	32
Howard v. Moot, 64 N. Y. 262..	105
Howland, Matter of, 75 App. Div. 207.....55, 56, 203, 238, 254, 263, 303	303
Howland v. Clendening, 134 N. Y. 305.....	33, 310
Hoyt, Matter of, 71 Hun. 13..	120, 129
Hoyt, Matter of, 32 State Rep. 787.....	131
Hoyt, Matter of, 116 App. Div. 217; 189 N. Y. 511.....	146
Hubbard v. Housley, 43 App. Div. 129; 160 N. Y. 688.....	100, 107
Hughes v. Hughes, 91 Wis. 138.....	355
Hughes v. Mackin, 16 App. Div. 291.....	39, 43
Hull v. Hull, 24 N. Y. 647.....	128, 131
Hull v. Osborn, 151 Mich. 8.....	354
Hume v. Randall, 141 N. Y. 499.....	78, 147, 175
Hunter v. Hunter, 17 Barb. 25.....	17, 22, 59, 126
Hunter v. Hunter, 31 Barb. 334.....	67
Hurlbut, Matter of, 51 Misc. 263.....	60, 233
Huss, Matter of, 126 N. Y. 537... ..	280, 349, 350, 351
Hutchins v. VanVechten, 140 N. Y. 115.....	99
Hutton v. Benkard, 92 N. Y. 295.....	4, 259, 260, 261, 278
Illensworth v. Illensworth, 110 App. Div. 399.....	267
Ingersoll, Matter of, 131 N. Y. 573.....	102, 281
Jackson v. Littel, 56 N. Y. 108.....	323
Jackson v. Sheridan, 50 N. Y. 660.....	323
Jacobs v. Morrison, 136 N. Y. 101.....	100
Jacobs' Will, <i>In re</i> , 29 Beav. 402.....	77
Jacoby v. Jacoby, 188 N. Y. 124.....	46, 47, 49, 50, 53, 102, 248
James v. Beasley, 14 Hun. 520.....	49, 291
Jansen v. Cairns, 3 Barb. Ch. 350.....	251
Jeefers v. Lampson, 10 Oh. St. 101.....	314
Jenkins, Matter of, 132 App. Div. 339.....	120, 129, 291
Jenkins v. Fahey, 73 N. Y. 355.....	94
Jenkins v. Freyer, 4 Pai. 47.....	48
Jennings v. Conboy, 73 N. Y. 230.....	4
Jennings v. Jennings, 7 N. Y. 547.....	41, 50, 54, 291
Jessup v. Pringle Memorial Home, 27 Misc. 427; 47 App. Div. 622..	280
Jewett v. Schmidt, 108 App. Div. 322; 184 N. Y. 608....	25
Johnson v. Brasington, 156 N. Y. 181.....	310, 313
Johnson v. Cornwall, 26 Hun. 499; 91 N. Y. 660.....	126
Johnston v. Hughes, 187 N. Y. 446.....	102, 266, 284
Johnston v. Spicer, 107 N. Y. 185.....	99
Jones v. Jones, 66 Wis. 310.	175
Jones v. Kelly, 170 N. Y. 401.....	285, 288
Josselyn v. Josselyn, 9 Sim. 63.....	77

TABLE OF CASES.

xxxi

(References are to pages.)

Kahn v. Tierney, 135 App. Div. 897; 201 N. Y. 516.....	59, 111, 139
Kalish v. Kalish, 166 N. Y. 368....	15, 41, 111, 131, 140, 235, 291, 292, 293
Kane v. Gott, 24 Wend. 641.....	75, 98, 287, 291
Kaupper, Matter of, 141 App. Div. 54; 201 N. Y. (Mem.)	70
Kavanaugh v. Watt, 143 Wis. 90.....	355, 356
Keenan v. Keenan, 122 App. Div. 435.....	48, 59, 231
Kelemen, Matter of, 126 N. Y. 73.....	102
Kelley v. Hogan, 71 App. Div. 343.....	175
Kelly v. Hovey, 35 App. Div. 273.....	283
Kelly v. Kelly, 61 N. Y. 47.....	343, 344
Kelso v. Lorillard, 85 N. Y. 177.....	86, 88, 91, 296, 301, 312, 344
Kene v. Hill, 102 App. Div. 370.	32
Kennedy v. Hoy, 105 N. Y. 134.	291
Kent v. Church of St. Michael, 136 N. Y. 10.....	23, 86, 88
Kent v. Kent, 99 App. Div. 112.....	309
Kenyon v. See, 94 N. Y. 563.....	213
Keogh, Matter of, 112 App. Div. 414; 186 N. Y. 544....	76, 129, 130, 132
Keogh, Matter of, 126 App. Div. 285; 193 N. Y. 603.....	88, 244
Kernochan v. Marshall, 165 N. Y. 472.....	58, 60, 86, 101, 104, 105, 231 308, 311
Kerr v. Dougherty, 79 N. Y. 327.....	285
Kerr v. Moon, 9 Wheat. 565.....	348
Kessler v. Friede, 29 Misc. 187.....	60
Keyser v. Mead, 53 Misc. 114.....	277
Kiah v. Grenier, 56 N. Y. 220.....	100, 102, 296, 301
Killam v. Allen, 52 Barb. 605.....	41, 102, 126, 291
Kilpatrick v. Barron, 54 Hun, 322; 125 N. Y. 751....	23, 94, 157, 162, 265
Kilpatrick v. Johnson, 15 N. Y. 322.....	130, 268, 291
Kilroy v. Wood, 42 Hun, 636.....	32
Kimberly, Matter of, 150 N. Y. 90.....	70, 248, 259
King, Matter of, 200 N. Y. 189.	248
King v. Irving, 103 App. Div. 420.....	32
King v. Rundle, 15 Barb. 139.....	131
King v. Whaley, 59 Barb. 71.....	235
Kingsbury v. Brandegee, 113 App. Div. 606.....	284
Kinkele v. Wilson, 151 N. Y. 269.....	126, 310
Kinnier v. Rogers, 42 N. Y. 531.....	80, 147, 149
Kip v. Hirsch, 103 N. Y. 565.....	43
Kirby, Matter of, 113 App. Div. 705.....	111, 112
Kirchner v. Kirchner, 71 Misc. 57.....	292
Kirk v. Kirk, 12 N. Y. Supp. 326; 137 N. Y. 510.....	23, 59, 101
Kirsch v. Tozier, 143 N. Y. 390.....	100
Kissam v. Dierkes, 49 N. Y. 602.....	27, 28
Knowlton v. Atkins, 134 N. Y. 313.....	89, 91, 93, 105, 166, 167, 247, 312
Knox v. Jones, 47 N. Y. 389....	57, 67, 203, 232, 233, 237, 260, 290, 291, 348
Knox v. Metropolitan El. Ry. Co., 58 Hun, 517; 128 N. Y. 625....	107, 231, 233

(References are to pages.)

Konvalinka v. Schlegel, 104 N. Y. 125.....	292
Kopmeier, <i>In re</i> , 113 Wis. 233..	355
La Chapelle v. Burpee, 69 Hun. 436.....	24, 97
LaFarge v. Brown, 31 App. Div. 542.....	41, 232, 293
Lahey v. Kortright, 132 N. Y. 450.....	104, 144, 149, 231
Lake v. Ascher, 152 N. Y. 684.....	324
Lally, Matter of, 136 App. Div. 781; 198 N. Y. 608....	42, 47, 49, 50, 140, 256
Lamb v. Lamb, 131 N. Y. 227.....	310, 312
L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 34.....	111
Lampson, Matter of, 161 N. Y. 511.....	285
Lane v. Albertson, 78 App. Div. 605.	157, 158, 168
Lane v. Brown, 20 Hun, 382.....	70
Lang v. Ropke, 5 Sandf. (S. C.) 363.....	39, 47, 126
Lang v. Wilbraham, 2 Duer, 171.....	39
Langdon, Matter of, 153 N. Y. 6.....	154
Langley v. Westchester Trust Co., 180 N. Y. 326.....	345
Lansing, Matter of, 182 N. Y. 238.....	91, 154
Lapham, Matter of, 37 Hun, 15.....	67, 70
Lawrence v. Bayard, 7 Pal. 70.....	323, 324
Lawton v. Corlies, 127 N. Y. 100.....	310
Leach v. Godwin, 198 N. Y. 35.....	67
Leake v. Robinson, 2 Meri. 363.....	341
Leask, Matter of, 197 N. Y. 193.....	208
Leavitt v. Wolcott, 95 N. Y. 212; (see 63 How. Pr. 51).....	25, 41, 68
Lee v. Lee, 2 How. Pr. (N. S.) 76	50
Lee v. Tower, 124 N. Y. 370.....	41, 287, 292, 348
Lefevre v. Lefevre, 59 N. Y. 434.....	285
Leggett v. Firth, 53 Hun, 152; 132 N. Y. 7.....	149, 175
Leggett v. Hunter, 19 N. Y. 445.....	33, 36, 231
Leggett v. Perkins, 2 N. Y. 297.....	4, 100, 101, 231
Lent v. Howard, 89 N. Y. 169.....	268, 287, 288
Leonard v. Burr, 18 N. Y. 96....	75, 91, 96, 111, 150
Levey v. Bull, 47 Hun, 350.....	32
Levi v. Scheel, 124 App. Div. 613.....	60, 71, 146
Levy v. Hart, 54 Barb. 248.....	42, 46, 58
Levy v. Levy, 33 N. Y. 97..	279, 280, 281, 290, 291
Lewis v. Howe, 174 N. Y. 340.....	312
Lewisohn v. Henry, 179 N. Y. 352.....	88, 111, 139, 312, 313, 339, 341
Liebmann v. Liebmann, 53 Misc. 488	59
Little v. Willford, 31 Minn. 173.....	355
Littlejohns v. Household, 21 Beav. 29.....	314
Livingston, Matter of, 34 N. Y. 555.....	32, 102
Livingston v. Greene, 52 N. Y. 118....	312, 339, 343
Livingston v. N. Y. Life Ins. & T. Co., 13 N. Y. Supp. 105; 36 N. Y. State Rep. 566; 151 N. Y. 667.....	63

TABLE OF CASES.

xxxiii

(References are to pages.)

Livingston v. Tucker, 107 N. Y. 549.....	24, 12
Locke v. F. L. & T. Co., 140 N. Y. 135.....	28, 43, 68, 71, 72, 100, 105, 107, 231, 309, 346
Locke v. Mabbett, 3 Abb. Ct. App. Dec. 68.....	32
Lockman v. Reilly, 95 N. Y. 64.....	267, 271, 272, 324
Lockwood v. Mildeberger, 159 N. Y. 181.....	149
Loder v. Hatfield, 71 N. Y. 92.....	347
Logan, Matter of, 131 N. Y. 456.....	267
Lorillard v. Coster, 5 Pal. 172; 14 Wend. 265.....	70, 75, 98, 137
Losey v. Stanley, 147 N. Y. 560.....	105, 108, 311
Lougheed v. D. B. Church, 58 Hun, 364; 129 N. Y. 211.....	95, 96, 106, 280, 308
Lounsbury & Trustees, 129 N. W. Rep. 36.....	355
Lovett v. Gillender, 35 N. Y. 617.....	78, 346
Lowenhaupt v. Stanisics, 95 App. Div. 171.....	146
Lyons v. Ostrander, 167 N. Y. 135.....	86, 343
Lythe v. Beveridge, 58 N. Y. 592.....	310
McArthur v. Gordon, 51 Hun, 511; 126 N. Y. 597.....	100
McArthur v. Scott, 113 U. S. 340.....	39
McClure, Matter of, 136 N. Y. 238.....	310, 313
McComb, Matter of, 117 N. Y. 378.....	287
McComb v. Title Guarantee & Trust Co., 36 Misc. 370; 70 App. Div. 618.....	120, 129, 293, 295
McCormack v. McCormack, 60 How. Pr. 196.....	128, 131
McCosker v. Brady, 1 Barb. Ch. 329; 3 Den. 610.....	59
McCurdy v. N. Y. L. I. & T. Co., 151 N. Y. 667.....	63
McDonald v. O'Hara, 144 N. Y. 566.....	157, 158, 287, 288
McDougall v. Dixon, 19 App. Div. 420.....	101
McEvoy v. Appleby, 27 Hun, 44.....	32
McGillis v. McGillis, 154 N. Y. 532.....	17, 94, 95, 167, 311, 312, 313, 339, 341
McGowan v. McGowan, 2 Duer, 57.....	24, 47, 126
McGrath v. Van Stavoren, 8 Daly, 454.....	268
McGraw, Matter of, 111 N. Y. 66.....	281, 288
McGregor v. McGregor, 22 N. Y. Week. Dig. 305.....	64
McGuire v. McGuire, 80 App. Div. 63.....	40, 129
McIrnerney v. Haase, 163 Mich. 364.....	354
McLouth v. Hunt, 154 N. Y. 179.....	67
McPherson v. Rollius, 107 N. Y. 316.....	100, 260
McSorley v. Leary, 4 Sandf. Ch. 414.....	41
McSorley v. Wilson, 4 Sandf. Ch. 515.....	57, 126
Maben, Matter of, 32 N. Y. State Rep. 790; rev'd 14 N. Y. Supp. 732; 60 Hun, 268; rev'd 131 N. Y. 255.....	344
Maccafil, Matter of, 127 App. Div. 21.....	272
Mahan, Matter of, 98 N. Y. 372.....	342, 345, 346

(References are to pages.)

Maitland v. Baldwin, 70 Hun, 267.....	67, 164, 173, 291
Mandlebaum v. McDonell, 29 Mich. 78.....	80, 96, 157, 354
Manice v. Manice, 43 N. Y. 303 ...	43, 45, 54, 55, 66, 69, 86, 94, 101, 111, 128, 129, 130, 131, 132, 133, 143, 155, 211, 251, 265, 268, 280, 291, 292, 309, 341, 342, 346, 347, 349
Manley v. Fiske, 139 App. Div. 665; 201 N. Y. 546.....	283
Manning v. Evans, 19 Hun, 500.....	32
Mansbach v. New, 58 App. Div. 191; 170 N. Y. 585.....	266
March v. March, 186 N. Y. 99.....	288, 312, 339
Marsellis v. Thalheimer, 2 Pal. 35.....	48
Marsh v. Wheeler, 2 Edw. Ch. 156.	347
Martelli v. Holloway, L. R. 5 H. of L. 532..	309
Martial, Matter of, 15 N. Y. Supp. 89.....	42
Martin v. Funk, 75 N. Y. 134.....	99, 267
Martin v. Pine, 79 Hun, 426.....	33, 290, 291
Martinus, Matter of, 65 Misc. 135.....	146
Marvin v. Smith, 56 Barb. 690; 46 N. Y. 571....	20, 34, 60, 102, 144, 145
Marx v. McGlynn, 88 N. Y. 357.....	100, 101, 104, 105, 273, 280, 285
Mason v. Jones, 2 Barb. 229; see 2 N. Y. 327, and 3 N. Y. 375....	50, 67, 71, 127
Mason v. Mason's Exrs., 2 Sandf. Ch. 432; 2 Barb. 229....	48, 67, 68, 111, 130, 131
Masury, Matter of, 28 App. Div. 580; 159 N. Y. 532.....	28
Matteson v. Armstrong, 11 Hun, 245.....	19
Matteson v. Palser, 173 N. Y. 404.....	38, 39, 49, 72, 86
Matthews v. Studley, 17 App. Div. 303; 161 N. Y. 633.....	67, 127
Maurice v. Graham, 8 Pal. 483.	127
Maxcy v. Oshkosh, 144 Wis. 238.....	356
Mead, Matter of, 27 State Rep. 36.....	40
Mead v. Mitchell, 17 N. Y. 210.....	23, 86, 88, 323, 325
Mee v. Gordon, 187 N. Y. 400.....	101, 309, 310
Meeker v. Draffen, 201 N. Y. 205.....	51
Meeks v. Meeks, 161 N. Y. 66 ..	310
Meldon v. Devlin, 31 App. Div. 146; 167 N. Y. 573.....	58, 59, 146, 148, 163
Mellen v. Mellen, 139 N. Y. 210.....	157, 158, 159, 168
Mendel v. Levis, 40 Misc. 271.....	67, 295
Metcalfe v. Union Trust Co., 181 N. Y. 39.....	23, 33, 108, 143, 274
Meth. Church v. Clark, 41 Mich. 730.....	354, 355
Meyer v. Cahen, 111 N. Y. 270.....	342
Mikantowicz, Matter of, 60 Misc. 273.....	47, 50
Miles v. Harford, 12 Ch. D. 691.....	301, 303
Miller v. Emans, 19 N. Y. 384.....	18, 96
Miller v. Gilbert, 144 N. Y. 68.....	311, 313, 341, 342
Miller v. McBlain, 98 N. Y. 517.....	343, 344
Miller v. Macomb, 26 Wend. 229.....	40, 343
Miller v. Wright, 109 N. Y. 194.....	167, 287, 288

TABLE OF CASES.

XXXV

(References are to pages.)

Mills v. Evansville Seminary, 58 Wis. 135.....	96
Mills v. Husson, 140 N. Y. 99.....	145, 258, 260, 267, 278
Mills v. Mills, 50 App. Div. 221.....	17, 33, 256
Milwaukee Protestant Home v. Becker, 87 Wis. 409.....	356
Miner, Matter of, 146 N. Y. 121.....	312, 324
Minot v. Minot, 17 App. Div. 521.....	324
Mitchell v. Thorne, 134 N. Y. 536.....	310
Moehring, Matter of, 154 N. Y. 423.....	175, 259, 261, 278
Moffett v. Elmendorf, 152 N. Y. 475.....	248, 312
Moloughney, Matter of, 67 App. Div. 148.....	47, 49, 72
Monarque v. Monarque, 80 N. Y. 320.....	23, 86, 88, 95, 248
Moncrief v. Ross, 50 N. Y. 431.....	287
Monson v. N. Y. S. & T. Co., 140 N. Y. 498.....	64
Montanye v. Montanye, 29 App. Div. 377.....	72
Montgomery v. Merrill, 18 Mich. 338.....	43
Montignani v. Blade, 145 N. Y. 111.....	58, 59, 60, 163, 231, 266, 324
Monypeny v. Monypeny, 131 App. Div. 269; 136 App. Div. 677; 202 N. Y. 90.....	55
Moore, Matter of, 152 N. Y. 602.....	343
Moore v. Appleby, 36 Hun, 368; 108 N. Y. 237..	91, 102, 106, 166, 167, 247
Moore v. Hegeman, 72 N. Y. 376.....	64
Moore v. Littel, 41 N. Y. 66...88, 89, 90, 91, 319, 320, 323, 324, 326, 327, 329, 330, 331, 332, 333, 334, 335, 339, 340	
Moore v. Lyons, 25 Wend. 119.....	343
Moore v. Moore, 47 Barb. 257.....	60, 62
Morgan v. Masterton, 4 Sandf. 442.....	41, 102
Morse v. Morse, 85 N. Y. 53.....	100, 101, 144, 231
Morton v. Morton, 8 Barb. 18.....	55
Morton v. Woodbury, 153 N. Y. 243.....	281, 308, 312
Morton Trust Co. v. Sands, 195 N. Y. 28.....	291, 293
Moser v. Talman, 114 App. Div. 850.....	285
Mott v. Ackerman, 92 N. Y. 539.....	17, 56, 70, 92, 93, 106, 149, 172, 216, 223, 261
Moultrie v. Hunt, 23 N. Y. 394.....	140
Mount, Matter of, 185 N. Y. 162.....	57, 64, 266, 291, 295
Mount v. Tuttle, 183 N. Y. 358.....	285, 348, 353
Mt. Morris Co-Op. B. & L. Assn. v. Smith, 120 N. Y. Supp. 676....	27
Mullarky v. Sullivan, 136 N. Y. 227.....	64, 312, 343
Mullins v. Mullins, 79 Hun, 421.	101, 157
Mullon, Matter of, 145 N. Y. 98.....	272
Mulreed v. Clark, 110 Mich. 229.....	354
Murphy, Matter of, 144 N. Y. 557.....	76, 213, 342
Murphy v. Whitney, 140 N. Y. 541...17, 76, 92, 94, 99, 111, 213, 228, 256	
Murray, Matter of, 75 App. Div. 246.....	296, 301
Murray, Matter of, 34 Misc. 39.....	285
Murray v. Miller, 178 N. Y. 316.....	248, 283, 285

(References are to pages.)

Mutual Life Ins. Co. v. Shipman, 108 N. Y. 19.....	49
Mutual Life Ins. Co. v. Shipman, 119 N. Y. 324.....	5, 149
Myer v. Thompson, 35 Hun, 561.....	32
Myers, Matter of, 131 N. Y. 409.....	82
Nat. Bank of Newburgh v. Bigler, 83 N. Y. 51.....	81
N. T. Bank v. Wetmore, 124 N. Y. 241.....	32
Nearpass v. Newman, 106 N. Y. 47.....	99
Neaves v. Neaves, 37 Hun, 438.....	49
Neilson v. Brown, 31 Misc. 562.....	76
Nellis v. Nellis, 99 N. Y. 505.....	17, 23, 87, 88, 92, 344, 345
Nelson v. Russell, 135 N. Y. 137.....	311, 344
Neresheimer v. Smyth, 167 N. Y. 202.....	266
Nesmith, Matter of, 140 N. Y. 609.....	129
Nester v. Nester, 68 Misc. 207.....	59
Newton v. Hunt, 134 App. Div. 325; 201 N. Y. 599.....	32
Newton v. Jay, 107 App. Div. 457.....	32
N. Y. Dry Dock Co. v. Stillman, 30 N. Y. 174.....	101, 102
N. Y. L. & W. R. R. Co., Matter of, 105 N. Y. 89.....	17, 343, 344
N. Y. Life Ins. & T. Co. v. Cary, 191 N. Y. 33.....	63, 309
N. Y. Life Ins. & T. Co. v. Kane, 17 App. Div. 542.....	129
N. Y. Life Ins. & T. Co. v. Livingston, 133 N. Y. 125.....	149, 159, 261
Nichols v. Nichols, 42 Misc. 381.....	64
Nicoll v. N. Y. & E. R. Co., 12 N. Y. 121.....	95, 209
Nicoll v. Walworth, 4 Den. 385.....	43, 106
Niles v. Mason, 126 Mich. 482.....	354
Norris v. Beyea, 13 N. Y. 273.....	17, 175, 265
Norton v. Norton, 2 Sandf. 296.....	106
Noyes v. Blakeman, 6 N. Y. 567.....	32
Obecny v. Goetz, 116 App. Div. 807; 134 App. Div. 166.....	140
O'Brien v. Mooney, 5 Duer, 51.....	41
Ockerman v. Cross, 54 N. Y. 29.....	348
Odell v. Youngs, 64 How. Pr. 56.....	39
O'Donaghue v. Smith, 184 N. Y. 365.....	26
Ogilby v. Hickok, 144 App. Div. 61.....	356
Ogsbury v. Ogsbury, 115 N. Y. 290.....	287
O'Hara, Matter of. See O'Hara v. Dudley.	
O'Hara v. Dudley, 95 N. Y. 403.....	102
O'Keefe v. Westphal, 139 App. Div. 79.....	50
Olcott v. Ossowski, 34 Misc. 376.....	62
Olney v. Hull, 21 Pick. 311.....	313
Onderdonk v. Onderdonk, 127 N. Y. 196.....	293
Onondaga T. & D. Co. v. Price, 87 N. Y. 542.....	260
Orange County Trust Co. v. Morrison, 56 Misc. 88.....	59, 76
O'Reilly, Matter of, 59 Misc. 136.....	82

TABLE OF CASES.

xxxvii

(References are to pages.)

Orphan Asylum v. White, 6 Dem. 201.....	222, 231
Oviatt v. Hopkins, 20 App. Div. 168.....	33
Owatonna, City of, v. Rosebrock, 88 Minn. 318.....	356
Owens v. Missionary Soc'y, 14 N. Y. 380.....	280
Oxley v. Lane, 35 N. Y. 340...39, 46, 47, 59, 69, 76, 78, 175, 203, 219, 291	
Paget v. Melcher, 156 N. Y. 399.....	88, 91, 94, 167, 339, 341
Palmer v. Dunham, 52 Hun, 468; 125 N. Y. 68.....	342
Palmer v. Hallock, 94 App. Div. 485.....	116
Palmer v. Horn, 84 N. Y. 516.....	244
Palms v. Palms, 68 Mich. 355.....	64, 129, 355
Parker v. Bogardus, 5 N. Y. 309.....	140
Parker v. Linden, 113 N. Y. 28.....	17, 157, 288
Parks v. Parks, 9 Pai. 107.....	126, 308
Paton v. Langley, 50 Mich. 428.....	351
Patterson v. Ellis, 11 Wend. 259.....	343, 346
Peard v. Kekewich, 15 Beav. 166.....	304
Pearson v. Collins, 113 App. Div. 657; 187 N. Y. 530.....	285
Peck v. Sherwood, 56 N. Y. 615.....	111
Pell, Matter of, 171 N. Y. 48.....	154
Pells v. Brown, Cro. Jac. 590; 1 Eq. Abr. 187, c. 4.....	180
Penniman v. Howard, 71 Misc. 598.....	356
Penny v. Croul, 76 Mich. 471.....	355
People v. Green, 56 N. Y. 466.....	138
People v. Powers, 147 N. Y. 104.....	281, 283
People v. Simonson, 126 N. Y. 299.....	280
Peo. <i>ex rel.</i> Short v. Bacon, 99 N. Y. 275.....	231
Peoples' Trust Co. v. Flynn, 188 N. Y. 385, reversing 113 App. Div. 683.....	86, 126, 144, 272, 292, 320, 332, 336, 340
Perkins, Matter of, 68 Misc. 255.....	285
Perry, Matter of, 48 Misc. 285.....	59, 76, 223, 307
Persous v. Snook, 40 Barb. 144.....	41, 292
Peterson v. De Baun, 36 App. Div. 259.....	91, 93, 333
Pfaler v. Raberg, 3 Dem. 360.....	41, 285
Phelps' Ex'r v. Pond, 23 N. Y. 69.....	41, 59, 61, 129, 280, 288, 346, 349
Phillips, Matter of, 56 Misc. 96.....	62
Phillips v. Davies, 92 N. Y. 199.....	64, 149, 310
Pickert v. Windecker, 73 Hun, 476.....	92
Pierce, <i>In re</i> , 56 Wis. 560.....	355
Pierpont v. Patrick, 53 N. Y. 591.....	312
Pierson v. Drexel, 11 Abb. N. C. 150.....	267
Pillsbury, Matter of, 50 Misc. 367; 113 App. Div. 893; 186 N. Y. 545.....	39, 172
Pimel v. Betjemann, 183 N. Y. 194.....	244
Plumb v. Tubbs, 41 N. Y. 442.....	96
Plymouth Soc'y v. Hepburn, 57 Hun, 161.....	95
Porter v. Baldwin, 139 App. Div. 278.....	272

(References are to pages.)

Post v. Bruere, 127 App. Div. 250.....	67
Post v. Hover, 33 N. Y. 593.....	55, 76, 102, 156, 292, 309
Power v. Cassidy, 79 N. Y. 602.....	287
Powers v. Powers, 28 Wis. 659.....	355
Pray, Matter of, 48 Misc. 285.....	146
Pray v. Hegeman, 92 N. Y. 508.....	64, 128, 131, 146, 268
Pray v. Hegeman, 98 N. Y. 351.....	64
Prentice v. Janssen, 79 N. Y. 478.....	157, 158, 288
Price v. Hall, L. R. 5 Eq. 399.....	314
Proctor v. Bishop of Bath & Wells, 2 H. Bl. 358.....	303
Provost v. Provost, 70 N. Y. 141.....	45, 59, 76, 156
Pruyn, Matter of, 141 N. Y. 544.....	25
Pryer v. Pryer, 126 N. Y. Supp. 393.....	64
Pulitzer v. City of N. Y., 48 App. Div. 6.....	138
Purdy v. Hayt, 92 N. Y. 446.....	70, 95, 204, 216, 221, 222, 223, 291, 304, 305, 307, 335
Putnam v. Lincoln Safe Deposit Co., 191 N. Y. 157.....	101
Putnam v. Putnam, 4 Bradf. 308.....	70
Quackenbos v. Kingsland, 102 N. Y. 128.....	344
Quade v. Bertsch, 65 App. Div. 600; 173 N. Y. 615.....	24, 76, 143, 156, 346
Quinn v. Hardenbrook, 54 N. Y. 82.....	313
Radley v. Kuhn, 97 N. Y. 26.....	55, 73, 75, 76, 94, 100, 111, 112, 113, 114, 125, 131, 156, 217, 311
Ranken, Matter of 101 App. Div. 189; 182 N. Y. 519.....	132
Rankine v. Metzger, 69 App. Div. 264; 174 N. Y. 540.....	108
Rausch v. Rausch, 21 N. Y. Supp. 786.....	79
Raymond, Matter of, 73 App. Div. 11.....	38, 39, 72
Raymond v. Harris, 84 App. Div. 546.....	32
Raymond v. Rochester Trust Co., 75 Hun, 239.....	33
Raymond v. Tiffany, 59 Misc. 283.....	32
Read v. Williams, 125 N. Y. 560.....	148, 251, 280, 281, 285, 287
Redfield v. Redfield, 126 N. Y. 466.....	126, 310
Reeves v. Snook, 86 App. Div. 303.....	146
Reformed P. D. Church v. Brown, 4 Abb. Ct. App. Dec. 31.....	281
Renwick v. Weeden, 135 App. Div. 695.....	143
Reynolds v. Denslow, 80 Hun, 359.....	101
Rhodes v. Caswell, 41 App. Div. 229.....	105, 267
Rice v. Barrett, 102 N. Y. 161.....	41, 131, 291
Richards v. Moore, 5 Redf. 278.....	41, 251
Richardson v. Amsdon, 85 N. Y. Supp. 342.....	17, 23
Rider v. Mason, 4 Sandf. Ch. 351; 2 Barb. Ch. 79.....	32
Riggs v. Purcell, 125 N. Y. 193.....	80
Riker v. Cornwell, 113 N. Y. 115.....	312
Riker v. Gwynne, 201 N. Y. 143.....	316

TABLE OF CASES.

xxxix

(References are to pages.)

Riker v. Leo, 115 N. Y. 93.....	279, 280, 281
Riker v. North American Relief Soc'y, 133 N. Y. 519.....	280, 281
Robb v. Washington & Jefferson College, 185 N. Y. 485.....	33, 99, 125, 126, 284, 285, 348, 350, 353
Roberts' Will, 98 N. Y. Supp. 809; 112 App. Div. 732.....	76, 256
Robert v. Corning, 89 N. Y. 225.....	19, 20, 22, 27, 75, 76, 88, 91, 101, 111, 113, 145, 155, 203, 246, 248, 272, 273, 274, 275, 276, 277, 280, 287, 288, 346
Robertson v. de Brulatour, 188 N. Y. 301	108
Robinson v. Martin, 200 N. Y. 159.....	308, 338, 340
Rochester, Matter of, 110 N. Y. 159.....	60
Rochevot v. Rochevot, 74 App. Div. 585.....	26
Rocke v. Rocke, 9 Beav. 66.....	77
Roe, Matter of, 119 N. Y. 509.....	103
Roe v. Vingut, 117 N. Y. 204.....	49, 132, 309
Rogers, Matter of, 22 App. Div. 428; 161 N. Y. 108.....	128
Rogers v. Rogers, 111 N. Y. 228.....	108
Rome Exch. Bank v. Eames, 4 Abb. Ct. App. Dec. 83.....	323
Rong v. Haller, 109 Minn. 191.....	354, 355
Roome v. Phillips, 24 N. Y. 463.....	86, 91, 311
Roos, Matter of, 4 Misc. 232.	146
Roosa v. Harrington, 171 N. Y. 341	88, 90, 91, 248, 308, 339, 341, 342
Roosevelt, Matter of, 143 N. Y. 120.....	91, 127
Roosevelt v. Porter, 36 Misc. 441.....	127
Roosevelt v. Roosevelt, 6 Hun, 31; 64 N. Y. 651.....	21, 28, 260, 269, 277
Roosevelt v. Thurman, 1 Johns. Ch. 220.....	78
Root v. Snyder, 161 Mich. 200.....	354
Root v. Stuyvesant, 18 Wend. 257.	73, 291
Rose v. Hatch, 55 Hun, 457; 125 N. Y. 427.....	100, 108, 175
Rose v. Hawley, 118 N. Y. 502.....	96
Rose v. Rose, 4 Abb. Ct. App. Dec. 108... ..	41, 204, 230, 231, 272, 280, 301
Rosenburg v. Rosenberg, 40 Hun, 91.....	59, 267
Ross v. Harden, 79 N. Y. 84.....	81
Rothschild v. Roux, 78 App. Div. 282.....	125
Rothschild v. Schiff, 188 N. Y. 327.....	283
Royce v. Adams, 123 N. Y. 402.....	149
Rudd v. Cornell, 171 N. Y. 114.....	248, 341
Ruppert's Estate, Tucker, 480	131
Russell, Matter of, 5 Dem. 388.....	41, 57, 309
Russell, Matter of, 168 N. Y. 169.....	70, 248, 287, 344
Ruth v. Oberbrunner, 40 Wis. 238.....	356
Ryder, <i>In re</i> , 11 Pal. 185.....	332
Ryder, Matter of, 41 App. Div. 247.....	220, 249
Ryder v. Lott, 123 App. Div. 685; 199 N. Y. 543.....	175
Sabbaton v. Sabbaton, 76 App. Div. 216.....	71
St. Amour v. Rivard, 2 Mich. 294.	354, 355

(References are to pages.)

St. John v. Andrews Institute, 191 N. Y. 254.....	25, 128, 145, 146, 280, 283, 284, 285, 348, 349, 350, 351
Salisbury v. Slade, 160 N. Y. 278.....	107, 144, 231, 247, 287, 288
Sand's Will, Matter of, 3 N. Y. Supp. 67, 20 State Rep. 850....	48, 49, 50
Sanford v. Goodell, 82 Hun, 369.....	93, 204, 223
Saperstein v. Ullman, 49 App. Div. 446.....	82
Saunders v. Vautier, 4 Beav. 115 (aff'd Cr. & Ph. 240).....	77
Savage v. Burnham, 17 N. Y. 561.....	46, 64, 67, 68, 266, 268, 287, 291, 292, 293, 342
Sawyer v. Cubby, 146 N. Y. 192.....	18, 45, 88, 90, 93, 94, 95, 204, 256, 263, 313
Saxton v. Webber, 83 Wis. 617.....	355
Sayles v. Best, 140 N. Y. 368.....	149, 157
Schenck v. Barnes, 156 N. Y. 316.....	30, 32
Schermerhorn v. Cotting, 131 N. Y. 48....	44, 51, 58, 60, 63, 64, 67, 68, 72, 146, 231
Schettler v. Smith, 41 N. Y. 328.....	50, 51, 57, 63, 146, 233, 291, 295, 296, 301, 303
Schey v. Schey, 194 N. Y. 368.....	140, 266, 291
Schierloh v. Schierloh, 148 N. Y. 103.....	102
Schlereth v. Schlereth, 173 N. Y. 444....	42, 47, 48, 49, 50, 55, 248, 266, 287, 290, 303, 341, 342
Schmidt v. Jennett, 195 N. Y. 486.....	310
Schnarr v. Henning, N. Y. Daily L. Reg. Dec. 23, 1882.....	41
Schneider v. Heilbron, 115 App. Div. 720; 101 N. Y. Supp. 152....	267
Scholle v. Scholle, 113 N. Y. 261.....	288, 308
Schreyer v. Schreyer, 101 App. Div. 456; 182 N. Y. 555. .	20, 27, 28, 109
Schuler, Matter of, 24 N. Y. Supp. 847.....	285
Schwartz v. Relfuss, 129 App. Div. 630; 198 N. Y. 585....	89
Scott v. Nevins, 6 Duer, 672.....	32
Scott v. West, 63 Wis. 529.....	105, 324, 355
Seaman, Matter of, 147 N. Y. 69.....	91, 311, 341, 342, 346
Seaward v. Davis, 198 N. Y. 415.....	175
Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624.....	348
Seebeck, Matter of, 140 N. Y. 241.....	265, 311, 312, 313, 342, 346
Seibert v. Miller, 34 App. Div. 602.....	312
Seitz v. Faversham, 141 App. Div. 903.....	356
Seymour, Matter of, 76 App. Div. 300.....	32
Shauhahan v. Kelly, 88 Minn. 202.....	356
Shattuck, Matter of, 193 N. Y. 446.....	284
Shaw v. English, 40 Misc. 37.....	76
Shepard v. Gassner, 41 Hun, 326.....	71, 72
Sheridan v. House, 4 Abb. Ct. App. Dec. 218....	323, 326
Sherman v. Sherman, 3 Barb. 385.....	140
Sherman v. Skuse, 166 N. Y. 345.....	32
Sherman v. Tucker, 60 App. Div. 127.....	32

TABLE OF CASES.

xli

(References are to pages.)

Sherwood v. Am. Bible Soc., 4 Abb. Ct. App. Dec. 227.....	101, 280, 285
Shields v. Klopff, 70 Wis. 19.....	348
Shipman v. Rollins, 98 N. Y. 311.....	41, 67, 232, 280, 291, 341, 347
Shotwell v. Mott, 2 Sandf. Ch. 46.....	57
Shult v. Moll, 132 N. Y. 122.....	310
Sillick v. Mason. See Rider v. Mason.	
Simpson v. Cook, 24 Minn. 180.....	40, 49, 59, 354
Simpson v. English, 1 Hun, 559.....	131
Simpson v. Trust Co. of America, 129 App. Div. 200; 197 N. Y. 586, 57, 58, 69, 266, 290, 307	
Skinner v. Quin, 43 N. Y. 99.....	80, 149
Slater v. Slater, 114 App. Div. 160; 188 N. Y. 633.....	111, 139
Sloan v. Tiffany, 103 App. Div. 540.....	32
Slocum, Matter of, 169 N. Y. 153.....	82, 129
Smith, Matter of, 131 N. Y. 239.....	43, 94, 248, 339, 346, 347
Smith v. Barrie, 56 Mich. 315.....	96
Smith v. Bell, 6 Pet. 68.....	175
Smith v. Central Trust Co., 154 N. Y. 233.....	348, 349
Smith v. Chesebrough, 176 N. Y. 317.....	281, 283, 291
Smith v. Edwards, 88 N. Y. 92.....	41, 48, 68, 75, 76, 102, 111, 150, 259, 272, 274, 291, 341, 346
Smith v. Farmer Type Founding Co., 16 App. Div. 438.....	157, 169
Smith v. Floyd, 140 N. Y. 337.....	73, 94, 163, 167
Smith v. Havens Relief Fund, 118 App. Div. 678; 190 N. Y. 557.....	285
Smith v. Hull, 97 App. Div. 228; 184 N. Y. 534.....	344
Smith v. Parsons, 146 N. Y. 116.....	132
Smith v. Robertson, 89 N. Y. 555.....	288
Smith v. Scholtz, 68 N. Y. 41.....	87, 319
Smith v. Secor, 157 N. Y. 402.....	23
Smith v. Smith, 141 N. Y. 29.....	312, 313
Smith v. Van Ostrand, 64 N. Y. 278.....	175, 265
Snell v. Tuttle, 44 Hun, 324.....	347
Snyder, Matter of, 21 N. Y. Supp. 430.....	41, 82
Soper v. Brown, 136 N. Y. 244.....	312
Southern v. Wollaston, 16 Beav. 166.....	39
Spencer, Matter of, 119 App. Div. 883; 190 N. Y. 517.....	154
Spencer v. Spencer, 38 App. Div. 403.....	129, 132
Spitzer v. Spitzer, 33 App. Div. 436.....	27, 28, 76, 145
Spofford v. Pearsall, 138 N. Y. 57.....	25
Stagg v. Jackson, 1 N. Y. 206.....	288
Stanley v. Payne, 65 Misc. 77.....	20
Staples v. Hawes, 39 App. Div. 548.....	41
Starr v. Starr, 132 N. Y. 154.....	25, 76, 308, 311
State v. Holmes, 115 Mich. 456.....	354
Stehlin v. Stehlin, 67 Hun, 110.....	47, 49
Steinhardt v. Cunningham, 130 N. Y. 292.....	101, 104, 107, 110

(References are to pages.)

Steinway v. Steinway, 163 N. Y. 183..	17, 25, 71, 76, 86, 87, 150, 204, 208, 254, 259, 261, 264, 265, 267, 272, 274, 309, 341, 342, 346
Stephenson v. Short, 92 N. Y. 433.....	285
Stettheimer v. Stettheimer, 24 N. Y. State Rep. 70; 114 N. Y. 501..	266
Stettheimer v. Tone, 114 N. Y. 501.....	266
Stevens, Matter of, 187 N. Y. 471.....	129
Stevens, Matter of, 161 N. Y. 122.....	290
Stevens v. Earl, 25 Mich. 41.....	43
Stevens v. Melcher, 152 N. Y. 551.....	25
Stevens v. Miller, 2 Dem. 597.....	50
Stevenson v. Lesley, 70 N. Y. 512.....	67, 68, 86, 99, 105, 106, 248, 343
Stevenson v. Short, 92 N. Y. 433.....	285
Stewart, Matter of, 131 N. Y. 274.....	148, 163
Stewart v. Hamilton, 37 Hun, 19.....	19, 20
Stewart v. McMartin, 5 Barb. 438.....	49
Stewart v. Robinson, 115 N. Y. 328.....	82
Stewart v. Woolley, 121 App. Div. 531.....	29, 266, 277
Stimson v. Vroman, 99 N. Y. 80.....	312
Stoiber v. Stoiber, 40 App. Div. 156.....	19, 20, 21, 27, 160, 203, 229, 273, 274, 277
Stokes v. Weston, 142 N. Y. 433.....	311, 312, 344
Storer v. Eyclesheimer, 4 Abb. Ct. App. Dec. 309.....	96
Storm v. Storm, 4 N. Y. State Rep. 670; 113 N. Y. 640.....	41
Strang, Matter of, 121 App. Div. 112.....	285
Strang v. Strang, 4 Redf. 376.....	251
Straut, Matter of, 126 N. Y. 201.....	25, 267, 271, 277
Stringer v. Young, 191 N. Y. 157.....	45, 86, 254, 259, 260, 262, 268
Sturgis, Matter of, 164 N. Y. 485.....	349, 350, 351
Surdam v. Cornell, 116 N. Y. 305.....	68, 87
Swarthout v. Ranier, 143 N. Y. 499.....	175
Sweeney v. Warren, 127 N. Y. 426....	4, 5, 25, 44, 147, 148, 163, 287, 288
Syms v. Mayor, 18 J. & S. 289.....	83
Syracuse Savings Bank v. Holden, 105 N. Y. 415.....	102
Tabernacle Church v. Fifth Ave. Church, 60 App. Div. 327; 172 N. Y. 598.....	5, 266
Taggart v. Murray, 53 N. Y. 233.....	40, 88, 89, 93, 94, 175, 311
Tallmadge v. E. River Bank, 26 N. Y. 105.....	97
Tallman v. Tallman, 3 Misc. 465.....	39
Tatum, Matter of, 169 N. Y. 514.....	73, 287, 313
Tavshanjian v. Abbott, 200 N. Y. 374.....	292
Tayloe v. Gould, 10 Barb. 388.....	57, 219, 248, 251
Teed, Matter of, 59 Hun, 63.....	285
Teed v. Morton, 60 N. Y. 502.....	94, 248, 339, 345
Temple v. Hawley, 1 Sandf. Ch. 153.....	54
Terry v. Wiggins, 47 N. Y. 512.....	175, 310
Thall v. Dreyfus, 84 App. Div. 569.....	33, 59

TABLE OF CASES.

xliii

(References are to pages.)

Thatcher v. St. Andrew's Church, 37 Mich. 264	354
Thayer v. McGee, 20 Mich. 195	96
Thebaud v. Schermerhorn, 30 Hun. 332	45, 99
Thellusson v. Woodford, 4 Ves. 227; 11 Ves. 112	185
Thieler v. Rayner, 115 App. Div. 626; 190 N. Y. 546	76, 220, 228, 230
Thomas, Matter of, Tucker, 367	204, 251
Thompson v. Carmichael's Ex'rs, 1 Sandf. Ch. 387	50, 57, 137, 251
Thompson v. Clendenen See Thompson v. Carmichael.	
Thompson v. Thompson, 28 Barb. 432	219, 251
Thorn v. Coles, 3 Edw. Ch. 330	41, 64, 67, 286
Thorn v. De Breteuil, 179 N. Y. 64	25, 82, 129
Tienken, Matter of, 60 Hun. 417; 131 N. Y. 391	106, 287, 288, 342, 344, 345, 347
Tierney v. Fitzpatrick, 195 N. Y. 433	267
Tiers v. Tiers, 98 N. Y. 568	50, 291
Tilden v. Green, 130 N. Y. 29	101, 163, 280, 291, 293, 308
Tillman v. Davis, 95 N. Y. 17	287
Title G. & T. Co., Matter of, 195 N. Y. 339	308, 312
Titus v. Weeks, 37 Barb. 136	47, 50, 128
Tobias v. Ketchum, 32 N. Y. 319	101, 292
Tobin v. Graf, 39 Misc. 412	131
Toher v. Crounse, 57 Misc. 252	47, 50
Tolles v. Wood, 1 Abb. N. C. 1, 16; 99 N. Y. 617	32
Tompkins, Matter of, 154 N. Y. 634	67, 106, 146, 231, 308, 310, 311, 344
Tompkins v. Verplanck, 10 App. Div. 572	295
Toms v. Williams, 41 Mich. 552	106, 128, 354, 355
Toronto G. T. Co. v. C. B. & Q. Co., 123 N. Y. 37	101, 267
Torpy v. Betts, 123 Mich. 239	354
Torrey v. Shaw, 3 Edw. Ch. 355	342
Totten, Matter of, 179 N. Y. 112	267
Tower, <i>In re</i> , 49 Minn. 371	354, 355
Towle v. Remsen, 70 N. Y. 303	89
Towler v. Towler, 142 N. Y. 371	28, 148, 163, 308
Townshend v. Frommer, 125 N. Y. 446	5, 32, 91, 94, 102, 105, 166, 247
Trask v. Sturges, 170 N. Y. 482	44, 157, 158, 168, 288, 309
Traver, Matter of, 161 N. Y. 54	312
Traver v. Schell, 20 N. Y. 89	342
Trolan v. Rogers, 79 Hun. 507	64
Trotter, Matter of, 104 App. Div. 188; 182 N. Y. 465	42, 67, 68
Trowbridge v. Metcalf, 5 App. Div. 318; 158 N. Y. 682	41, 94, 162 277, 348
Trufant v. Nunneley, 106 Mich. 554	354
Trumble, Matter of, 199 N. Y. 454	77
Trunkey v. Van Sant, 176 N. Y. 535	291
Truslow, Matter of, 140 N. Y. 599	67, 312, 343
Trustees v. Cowen, 4 Pal. 510	97
Trustees v. Kellogg, 16 N. Y. 83	311

(References are to pages.)

Trustees v. Lynch, 70 N. Y. 440.....	97
Tucker v. Bishop, 16 N. Y. 402.....	87, 94, 161, 248, 346
Tucker v. Tucker, 5 N. Y. 408.....	41, 156, 311
Tuthill v. Davis, 121 App. Div. 290	175
Tweddell v. N. Y. Life Ins. & T. Co., 49 App. Div. 258, aff'd 166 N. Y. 608.....	164, 173
Tweddell v. N. Y. Life Ins. & Trust Co., 82 Hun, 602.....	131
Tyson v. Blake, 22 N. Y. 558	265
Tyson v. Tyson, 96 Wis. 59.....	355
Ullman v. Cameron, 186 N. Y. 339	32, 35, 116
Underwood v. Curtis, 127 N. Y. 523.....	21, 40, 72, 101, 247, 257, 266, 274 275, 276, 287, 288, 291, 293, 310, 346
Ungrich, Matter of, 48 App. Div. 594, aff'd 166 N. Y. 618.....	208, 265
Ungrich, Matter of, 201 N. Y. 415.....	31, 32, 115
United States v. Gilmore, 8 Wall. 330.....	138
U. S. Trust Co., Matter of, 175 N. Y. 304.....	33
U. S. Trust Co. v. Black, 146 N. Y. 1.....	312
U. S. Trust Co. v. Chauncey, 32 Misc. 358.....	63
U. S. Trust Co. v. Hogencamp, 191 N. Y. 281.....	89, 235
U. S. Trust Co. v. Roche, 116 N. Y. 120	109, 111, 162, 247
U. S. Trust Co. v. Soher, 178 N. Y. 442.....	129, 130, 145, 146
U. S. Trust Co. v. Wheeler, 73 App. Div. 289; 173 N. Y. 631.....	342, 346
Upington v. Corrigan, 151 N. Y. 143.....	96, 209
Vail v. L. I. R. R. Co., 106 N. Y. 283.....	96
Vail v. Vail, 7 Barb. 226; 4 Pai. 317.....	10, 52
Van Axte v. Fisher, 117 N. Y. 401.....	86, 106, 211, 316
Van Brunt v. Van Brunt, 111 N. Y. 178.....	44, 51, 67, 68, 70, 106
Van Buren v. Dash, 30 N. Y. 393.....	292
Van Camp v. Fowler, 59 Hun, 311.....	106
Van Cott v. Prentice, 104 N. Y. 45.....	24, 28, 35, 36, 44, 45, 49, 51, 59, 63, 99, 100, 101, 104, 108, 343
Vanderbilt, Matter of, 20 Hun, 520.....	27, 59
Vanderbilt, Matter of, 50 App. Div. 246; 163 N. Y. 597.....	154
Vanderpoel v. Loew, 112 N. Y. 167.....	64, 66, 68, 69, 71, 76, 88, 106, 156, 309, 346
Vanderzee v. Slingerland, 103 N. Y. 47.....	343, 344, 345
Van Horne v. Campbell, 100 N. Y. 287.....	175
Van Nostrand v. Marvin, 16 App. Div. 28; 161 N. Y. 650.....	95, 106
Van Nostrand v. Moore, 52 N. Y. 12.....	67, 309, 311
Van Rensselaer v. Van Rensselaer, 113 N. Y. 207.....	346
Van Schuyver v. Mulford, 59 N. Y. 426.....	68, 291, 293
Van Vechten v. Keator, 63 N. Y. 52.....	287, 288
Van Vechten v. Van Veghten, 8 Pai. 104; 1 Sandf. Ch. 395.....	19, 41, 265 291
Verdin v. Slocum, 71 N. Y. 345.....	100, 101

TABLE OF CASES.

xlv

(References are to pages.)

Vernon v. Vernon, 53 N. Y. 351.....	76, 82, 100, 101, 145, 346
Verplanck, Matter of, 91 N. Y. 439....	46, 67, 68, 71
Viele, Matter of, 35 App. Div. 211.....	71, 146
Viele v. Keeler, 129 N. Y. 190.....	150, 310
Vincent v. Newhouse, 83 N. Y. 505.....	248, 287, 345, 347
Von Hesse v. MacKaye, 136 N. Y. 114.....	28
Voorhis v. Voorhis, 66 Misc. 78.....	27
Wadd v. Hazelton, 137 N. Y. 215.....	100
Wadsworth v. Wadsworth, 12 N. Y. 376..	17, 97
Wager v. Wager, 89 N. Y. 161.....	272
Wager v. Wager, 96 N. Y. 164.....	175
Wainwright v. Low, 132 N. Y. 313.....	31, 35, 100
Waldron, Matter of, 57 Misc. 275.....	285
Walker, Matter of, 136 N. Y. 20.....	285
Walker v. Steers, 38 State Rep. 654, 14 N. Y. Supp. 398.....	82
Walker v. Taylor, 15 App. Div. 452.....	42
Wallace v. Berdell, 97 N. Y. 13.....	99, 108
Wallace v. Diehl, 202 N. Y. 156.....	324
Walsh v. Waldron, 63 Hun, 315; 135 N. Y. 650 ...	41, 48, 61, 67, 293, 307
Walter v. Walter, 60 Misc. 383; 133 App. Div. 893, aff'd 197 N. Y. 606	41, 291
Ward v. Ward, 105 N. Y. 68....	21, 22, 41, 64, 67, 68, 94, 101, 102, 149, 233
Ward v. Ward, 23 Week. Dig. 466 (see 105 N. Y. 68).....	64
Warner v. Durant, 76 N. Y. 133.....	76, 106, 270, 272, 341, 346
Warner v. Jaffray, 96 N. Y. 248....	348
Washbon v. Cope, 144 N. Y. 287	310, 344
Watkins v. Reynolds, 123 N. Y. 211....	43, 167
Watts, Matter of, 68 App. Div. 357..	87
Webb v. Sweet, 187 N. Y. 172.....	320
Webster v. Morris, 66 Wis. 364.....	111, 279, 355, 356
Weeks v. Cornwell, 104 N. Y. 225....	101, 102, 107
Weeks v. Frankel, 197 N. Y. 304.....	108
Weinstein v. Weber, 178 N. Y. 94.....	147, 175
Wells, Matter of, 113 N. Y. 396.....	345
Wells v. Brooklyn Union Elevated Railroad Co., 121 App. Div. 491; 193 N. Y. 641.....	287
Wells v. Seeley, 47 Hun, 109.....	175
Wells v. Squires, 117 App. Div. 502; 191 N. Y. 529....	17, 76, 77, 256, 266 268, 270, 277
Wells v. Wells, 88 N. Y. 323.....	64, 67, 68, 287
Wendt v. Walsh, 164 N. Y. 154.....	35, 100, 102, 107, 175
Westcott v. Cady, 5 Johns. Ch. 334.....	312
Wetmore v. Parker, 52 N. Y. 450.....	280, 285
Wetmore v. Porter, 92 N. Y. 76.....	111, 267

(References are to pages.)

Wetmore v. Truslow, 51 N. Y. 338.....	32, 101
Wetmore v. Wetmore, 149 N. Y. 520; 162 N. Y. 503.....	32
Whalen, Matter of, 143 App. Div. 743.....	356
Wheeler v. Lester, 1 Bradf. 213.....	347
Wheeler v. Ruthven, 74 N. Y. 428.....	342
White v. Howard, 46 N. Y. 144.....	280, 285, 287, 348
White v. Miller, 71 N. Y. 118.....	281
Whitefield v. Crissman, 123 App. Div. 233.....	139, 266, 273, 277
Whitney v. Whitney, 63 Hun, 59.....	138
Wieting v. Bellinger, 59 Hun, 324.....	78
Wilber v. Wilber, 45 App. Div. 158; 165 N. Y. 451.....	17, 75, 150, 166, 229, 245, 256, 312
Wilcox, Matter of, 194 N. Y. 288 ...	19, 27, 40, 42, 57, 58, 63, 73, 87, 143, 202, 203, 208, 210, 213, 216, 217, 219, 221, 230, 232, 237, 239, 240, 246, 247, 251, 254, 255, 257, 259, 261, 262, 263, 265, 274, 287, 291, 296, 301, 302, 303, 304, 320, 337, 340
Wiley, Matter of, 188 N. Y. 579.....	203
Wilkin, Matter of, 183 N. Y. 104.....	20, 156, 266, 273, 277
Willetts v. Titus, 14 Hun, 554.....	132
Willetts v. Willetts, 20 Abb. N. C. 471; 35 Hun, 401, rev'd 103 N. Y. 650.....	102, 345
Williams v. Boul, 101 App. Div. 593; 184 N. Y. 605.....	101, 310, 344
Williams v. Conrad, 30 Barb. 524.....	291
Williams v. Jones, 166 N. Y. 522.....	89, 235, 309, 311, 312, 344
Williams v. Montgomery, 148 N. Y. 519.....	17, 18, 22, 23, 76, 82, 256, 270, 272, 274
Williams v. Thorn, 70 N. Y. 270.....	32, 259, 260
Williams v. Williams, 8 N. Y. 525.....	131, 146, 281, 283
Wilson v. Lynt, 30 Barb. 124.....	279
Wilson v. Odell, 58 Mich. 533.....	128, 355
Wilson v. White, 109 N. Y. 59.....	296, 301
Wilson v. Wilson, 120 App. Div. 581.....	292
Woerz v. Rademacher, 120 N. Y. 62.....	110
Woodbridge v. Boekes, 59 App. Div. 503; 170 N. Y. 596 ...	25, 111, 175
Woodgate v. Fleet, 44 N. Y. 1.....	40, 85, 293
Woodgate v. Fleet, 64 N. Y. 566.....	45, 47, 55, 71, 72, 102, 291
Woodruff v. Cook, 47 Barb. 304.....	223
Woodruff v. Cook, 61 N. Y. 638.....	220, 223, 232, 290
Woodward v. James, 44 Hun, 95; 115 N. Y. 346.....	59, 101, 108
Wright v. Mayer, 47 App. Div. 604.....	59
Wright v. Mercein, 34 Misc. 414.....	50
Wright v. Saddler, 20 N. Y. 320.....	97
Wright v. Trustees, Hoffm. Ch. 202.....	288
Yates v. Yates, 9 Barb. 324.....	93, 131, 137, 281
Young, Matter of, 145 N. Y. 535.....	88, 94, 162, 166, 311
Young v. Barker, 141 App. Div. 801.....	295

TABLE OF CASES.

xlvii

(References are to pages.)

Young v. Heermans, 66 N. Y. 374.....	32
Young v. Young, 80 N. Y. 422.	99
Young v. Young, 127 App. Div. 130.....	28, 35
Young's Settlement, <i>In re</i> , 18 Beav. 199.....	77
Young Women's Christian Home v. French, 187 U. S. 401.....	89
Zahrt, Matter of, 94 N. Y. 605.....	292
Zartman v. Ditmars, 37 App. Div. 173.....	312, 346

SUSPENSION
OF THE
ABSOLUTE POWER OF ALIENATION,
AND
POSTPONEMENT OF VESTING.

CHAPTER I.

INTRODUCTORY.

THE THREE RULES.

Rule I. Alienability.

Rule II. Vesting.

Rule III. Absolute Ownership.

SCOPE OF THE RULES.

HISTORICAL.

PURPOSES OF THE RULES.

The Three Rules.

§ 1. The provisions of the Real Property Law furnish two separate Rules, one dealing with suspension of the absolute power of alienation, and the other with postponement of the vesting of certain future estates. These Rules are as follows:

§ 2. **Rule I. Alienability.** THE POWER OF CONVEYING THE ABSOLUTE FEE, IN POSSESSION, SHALL NOT BE SUSPENDED BEYOND THE STATUTORY PERIOD.

§ 3. Under this rule, two points call for special notice; first, that it affects all estates, interests, rights

and possibilities, of every character, which are capable of interfering with the power of conveying the absolute fee in possession; secondly, that it does not insist upon vesting, but merely upon absolute alienability.

§ 4. **Rule II.** *Vesting.* ESTATES IN REMAINDER SHALL BE SO LIMITED THAT WITHIN THE STATUTORY PERIOD, IF EVER, THEY MUST VEST IN INTEREST.

§ 5. This rule is thus seen to apply to only one class of future estates, namely, "remainders;" but to insist not only on absolute alienability, but also on vesting, which is a broader term and (except in certain cases of vesting in trust) includes alienability.

§ 6. The Personal Property Law furnishes one Rule, which deals, in itself, as applied to personal property, both with alienability and with vesting. This rule is as follows:

§ 7. **Rule III.** *Absolute Ownership.* THE ABSOLUTE OWNERSHIP OF PERSONAL PROPERTY SHALL NOT BE SUSPENDED BEYOND THE STATUTORY PERIOD.

Scope of the Rules.

§ 8. The absolute power of alienation is suspended, under Rule I, when there are no persons in being by whom an absolute fee in possession can be conveyed. The discussion of this subject will accordingly involve consideration of the several forms of disposition by which an absence of such persons may be occasioned. One such form consists of certain express trusts under which the trustee is strictly required and obliged to retain the title, and for that reason the estate cannot be conveyed; a second form consists of certain contingent future estates, actual or potential, which, because not represented by any persons as yet in being, cannot be conveyed; and a third form consists of certain powers

which for one reason or another prevent, or co-operate in preventing, an absolute conveyance. Thus, on the one hand, the mere fact that an estate is vested, as in the case of an express trust, does not necessarily involve alienability; and on the other hand, the mere fact that an estate is contingent, as it may be even though all the persons in whom it can possibly vest in future, under the limitations of the instrument, are now in being, does not necessarily involve inalienability. In other words, the test of suspension of the power of alienation, under Rule I, is not to be found in the distinction between vested and contingent estates, but solely in the existence, or non-existence, of persons by whom an absolute fee in possession can be conveyed.

§ 9. Under Rule II, on the contrary, which relates to remainders, what is required is not only alienability, but vesting. The mere fact that an estate is alienable, does not necessarily imply that it is vested; nor does the mere fact that it is inalienable necessarily imply that it is not vested. The test under Rule II is not to be found in the distinction between alienable and non-alienable remainders, but in the distinction between remainders which are vested and those which are contingent.

§ 10. The mutual relations of the two Rules may therefore be summed up thus: Rule I covers the entire field of estates, and of such interests, rights and possibilities as may develop into estates. But although its field is broad, its requirement is narrow. It calls only for absolute alienability. Rule II is confined to the restricted field of remainders, but although its field is narrow, its requirement is broad. It calls for vesting, and thereby (except in the case of trusts where the estate may be vested and yet inalienable) requires absolute alienability and more beside.

§ 11. Rule III, by its requirement of absolute ownership, combines in itself, as applied to personal property, the two Rules which relate to real property, and thus deals both with alienability and with vesting.

Historical.

§ 12. In the preparation and enactment of the Revised Statutes, two courses were open to the Revisers and the Legislature. For on any given topic it was possible, on the one hand, to set forth in statutory form certain propositions, not covering the entire ground, and either declaring or changing the common law in part, and thus to leave the common law in force as such, except as thus affected;¹ or on the other hand, to abrogate, or at least attempt to abrogate, the common law on a large scale, and establish, upon the given subject, a code, new, complete and exclusive. And in fact, sometimes one, and sometimes the other, of these two courses was adopted. The law in relation, for example, to powers, was thus codified,² so that "the prior law as to powers is of little use in the investigation of powers as they are now defined and authorized; * * * ." ³

§ 13. On the other hand, in the case of express trusts, the Legislature did not abolish all, and then create certain specified classes which should be permitted; but abolished all except four, and left those four standing, within defined limits.⁴

¹ *Bertles v. Noonan*, 92 N. Y. 157.

² *Cutting v. Cutting*, 86 N. Y. 522, 537, 544-7; *Real Prop. L.* § 130.

³ *Jennings v. Conboy*, 73 N. Y. 230, 233; *Hutton v. Benkard*, 92 N. Y. 295, 305; *Sweeney v. Warren*, 127 N. Y. 426, 433; *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266, 275.

⁴ *Real Prop. L.* § 96; *Leggett v. Perkins*, 2 N. Y. 297, 307. Compare *Hawley v. James*, 16 Wend. 61, 148, 163; and see *Chaplin Express Trusts and Powers*, §§ 395, 530, 531. See also the effect of subsequently reviving a fifth class, relating to charities. Chapter VIII. And as to trusts of

§ 14. But even where the intention has been to establish a new and exclusive code, the prior law is not, of course, thus deprived of its interest or value in connection with the study of the law of New York. For on account of the historical relation between the two systems, and the consequent need of an understanding of the earlier for the light it throws on the later, we must constantly resort to the common law for explanations, and for definitions and rules of construction, where the statute itself is deficient.¹ Indeed, under our legal system, and with our legal traditions and methods of thought, it must always be excessively difficult, if not impossible, on any given subject, to make a general codification which shall be entirely exhaustive and exclusive; and on points not covered by the statutes the courts seek for light in the prior law, in so far as consistent with the scheme of the statute. Even in the case of so successful a codification as that of the law of powers, it has been held that there was no attempt, in the Revision, to enumerate or define all the acts which might lawfully be done under a power.² And in *Mutual Life Ins. Co. v. Shipman*,³ the court refer to the prior law of powers, and quote from Sugden, Kent, and Perry, to show the existence of a principle in the light of which they construe one of the sections of the article on Powers, saying that it had been established long before the enactment of our Revised Statutes, and was in the immediate contemplation of the Revisers when they framed the section in question.⁴

personal property, *Tabernacle Church v. Fifth Ave. Church*, 60 App. Div. 327, 334, aff'd 172 N. Y. 598.

¹ *Hawley v. James*, 16 Wend. 61, 148.

² *Downing v. Marshall*, 23 N. Y. 366, 379-380.

³ 119 N. Y. 324, 328, 329.

⁴ See also *Barber v. Cary*, 11 N. Y. 397, 402; *Sweeney v. Warren*, 127 N. Y. 426, 433; *Darling v. Rogers*, 22 Wend. 483, 495-496; *Townshend v. Frommer*, 125 N. Y. 446, 465.

§ 15. Now there are no express adjudications upon the status of the enactments embodied in the three Rules already set forth, as either merely amending the prior law in part and thus leaving it in force except as so changed; or constituting a new and complete codification substituted for the entire body of the earlier law thus repealed. But from the comprehensive and detailed nature of the statutory scheme, it appears quite certain that the intended, and accomplished, result was to deal with the entire subject in all its general phases, and in particular to provide a "statutory period" for every possible form of suspension of alienability or postponement of vesting, leaving no opportunity for recourse to the common law for a further extension or a different measure of the term.

§ 16. In addition, it is evident that the scheme adopted by the Revisers, in dealing specifically with suspension of alienability, and postponement of vesting, has relieved us, in New York, from the search after the true and exact nature of the common law "perpetuity." Some learned writers both in England and America, have held, as applied to the period of the preparation and enactment of our Revised Statutes, that the Rule against Perpetuities was nothing whatever but a rule against undue suspension of the power of alienation (thus dealing with the same subject covered by our Rule I) and except in that sense had nothing to do with remoteness of vesting merely as such, and that it was only later that it came to have a direct relation to remoteness of vesting. From this proposition, the argument is sometimes derived that the Revisers must have understood the subject of Perpetuities as strictly confined to suspension of the power of alienation. The New York writers above referred to, direct special attention in their works to the statutes which are

embodied in Rule II, above. In accordance with what they consider the great weight of authority, they regard them merely as not coming under the head of perpetuities.

§ 17. On the other hand, Mr. Marsden, Mr. Lewis, and Professor Gray all maintain, as applied to the time in question, that the English Rule against Perpetuities, though not fully developed in all its details, was a rule applicable to remoteness of vesting; and in any event, and whatever the English Rule against Perpetuities may have been earlier, it did at any rate come eventually, even if not until after the time of our Revision, to have relation to postponement of vesting.

§ 18. But with us all this, except as applied to instruments governed by the law as it existed prior to our Revision, is now quite immaterial, and a mere matter of names. Our statutes do not use the term perpetuities. What they do, is to furnish various provisions covering, separately, the two subjects of suspension of alienability, and postponement of vesting, as embodied in the Rules above set forth. Whether we should regard these several statutes, taken together, as intended to form a revised and modified Rule against Perpetuities, in both the senses referred to; or regard those relating to alienability, or those relating to vesting, as being, one or the other, the special successor of the common law Rule; appears to be of no practical consequence. The important fact is, that all the statutes referred to are on the books and in force; that they cover all cases under the two subjects, and that their effect is as embodied in the Rules set forth above.

§ 19. Rule I, Alienability, and Rule II, Vesting, were formulated and stated in the first edition of this book,

in the same terms as in the present edition; and here, as there, the terms "perpetuity" and "remoteness" have been avoided in all references to the New York statutes, because their use, under the circumstances already set forth, would tend to uncertainty and confusion.¹ But for the general light which may be thrown upon our statutes by the earlier law, some further consideration of its history is set forth in Chapter VI of this volume.

The Purposes of the Rules.

§ 20. The reasons for the existence of the respective Rules relating to Alienability and to Vesting, all arise out of considerations of public policy. Some of these reasons apply to both Rules, and in addition each of the Rules is intended to attain certain ends peculiar to itself.

§ 21. In respect to Rule I, concerning suspension of the absolute power of alienation, the main purpose is to confine within specified limits the period during which property may be so tied up that it cannot come upon the market, or cannot be freed from its special character as an "estate" or "fund" and restored to the status of ordinary property owned outright by individuals who can sell or spend it. The general theory of this Rule is, that the public interest is not advanced by allowing the owner of property unlimited opportunity, in granting or devising it, to render it thereafter inalienable, or to prevent the use or dissipation of the fund or estate which it makes up; and that the useful protection which such efforts may sometimes afford to those who need protection, is more than offset by the unfortunate disturbance of normal conditions, not only

¹ Matter of Wilcox, 194 N. Y. 288, 298-299.

in relation to the movement of property on the market, and its development and improvement, but also in its effect on the independence of character and personal initiative of the persons protected. It seeks, therefore, while recognizing the frequent propriety of such interferences in given instances, to restrict them within natural and appropriate boundaries. Thus the owner of property may suspend the power of alienation during the lives of any two persons living when the disposition is made, and by dividing his property into shares, may, as to each share, effect such suspension for two lives in being; and to allow further leeway, the statute permits such arrangements to continue, in certain special cases, during a further minority.

§ 22. In respect to Rule II, concerning the postponement of vesting, there are many reasons why it should exist in the form of the present statutes which it embodies. For in other jurisdictions where a similar rule now exists, experience, as represented in the gradual growth of the rule from its earlier form, has proved the development to be a wise one. The aggregate value to their owners, of successive estates making up a fee, is far greater if they are all vested than if some are contingent even though alienable,¹ and in view of the relatively great interest in such questions, of minors and of others inexperienced in affairs, or incompetent, this feature has a direct public application.

§ 23. And then the possible continued existence, throughout long periods, of contingent rights and possibilities, tends to increase litigation. Such litigation, likely to be instituted when it may have become difficult to obtain the best evidence of intent, in given cases, is not calculated to attain just results, and all litigation entails heavy public expense.

¹ Gray, *Perpetuities*, 2nd Ed. § 268.

§ 24. So, too, the spirit engendered by remote possibilities of acquiring property at distant periods by mere luck, or chance happenings, as distinguished from appropriate allowance of due provision for persons in being, or for infants, is distinctly of a nature injurious to the community. And here we may apply what Chancellor Walworth said concerning the law of accumulations:¹ "there are no surer means of paralyzing the exertions and destroying the future usefulness of a legatee, than to hold out to him the prospect of great wealth for himself or his children, at some distant period, without the exercise of ordinary industry and enterprise in obtaining it."

§ 25. And further, where future interests are uncertain, and during long periods no one is assured of absolute ownership, property is not likely to be as well developed and cared for, from the point of view of the public interest.² And the postponement of vesting tends to introduce considerable uncertainty and confusion into the administration of the law, as for example in the law relating to taxes on successions, or to involve danger of arbitrary and unfair methods in efforts to avoid such uncertainty. If the contingencies might continue indefinitely, the difficulty in collecting taxes of this nature, under fair regulations, would be greatly increased.

§ 26. The law always favored vesting and the weight of this principle is not impaired by the fact that some of the former reasons for it have disappeared; others have taken their places.

§ 27. All these reasons support Rule II, in addition to the special and technical reasons which co-operated in

¹ *Vail v. Vail*, 4 *Pai.* 317, 332.

² *Gray*, *Perpetuities*, 2nd Ed. § 268.

bringing about the enactment of some of the statutes embodied in the Rule. And in order to obviate these difficulties, and at the same time allow appropriate opportunity to the owner of property to adapt his plans to the special circumstances he has to deal with, the statutes fix again, as in the case of Rule I, upon an authorized term for the suspension of vesting, of two lives in being, and in certain special cases a further minority. The subjects discussed under the present subdivision, are further considered in §§ 31-36, and in Chapter VI.

§ 28. Rule III, concerning suspension of the absolute ownership of personal property, and thus embodying provisions in relation both to alienability and to vesting, rests on reasons similar to those which support the statutes represented by Rule I and Rule II.

CHAPTER II.

GENERAL PRINCIPLES.

ALIENABILITY. THE GENERAL STATUTORY PROVISION.

THE ABSOLUTE POWER OF ALIENATION.

NO PERSONS IN BEING.

THE STATUTORY PERIOD.

The Creation of the Estate.

Two Lives in Being.

Two Lives the Necessary Measure. Exception.

Designation of the Lives.

Any Two Lives may be Designated.

Part of a Life is a Life.

A Minority is a Life.

The Period of Gestation.

Life of Eldest or Youngest Surviving Child.

Life of Wife, Widow, Husband.

The Additional Term of Minority.

The Statutory Requirement is Imperative.

Subordinate Measures of Period when Permitted.

Alternative Lives, when Permitted.

Successive Suspensions under Successive Instruments.

Separate Statutory Periods for Separate Shares.

Number of Beneficiaries is not Limited.

Illegal Term is not Presumed.

The Statutory Period for Contingencies.

The Statutory Period for Trusts to Apply Rents.

The Statutory Period for Trusts to Accumulate Rents.

The Statutory Period as to Powers.

The Statutory Period as to Chattels Real.

The Statutory Period as to Disposition of Rents.

The Statutory Period for Postponement of Vesting.

The Statutory Period as to Personal Property.

CERTAIN DISPOSITIONS NOT AFFECTED.

§ 29. The relations between the Rules now to be discussed, and between the various subdivisions into which the discussion naturally divides itself, make it conveni-

ent to take up for consideration at this point certain subjects of a more or less general application.

Alienability. The General Statutory Provision.

§ 30. The principal statutory provision upon which Rule I, relating to Alienability, is founded, is as follows:

"The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority." ¹

The "Absolute Power of Alienation."

§ 31. Notwithstanding the apparent simplicity of the definition with which this statutory provision begins, the term "suspension of the absolute power of alienation" is in fact employed in three somewhat different senses, which should now be considered:

§ 32. (1) For in the first place, and in a literal and very obvious sense, it is applied to cases where particu-

¹ Real Prop. L. § 42.

lar designated property is subjected to some trust, contingency or other provision such as to cause inalienability, and accordingly the "absolute power of alienation," as applied to that particular property, is suspended.¹

§ 33. (2) In the second place, the term is applied to cases where, though the particular property actually designated in the instrument and originally transferred by it is in itself rendered alienable, yet the instrument does impose on the proceeds of any sale of that property, or on any property that may be taken in exchange, some trust, contingency or other provision such as to render the same inalienable. In such a case the absolute power of alienation, as applied to the original property itself, is not suspended, but as applied to that which may be substituted for it, and the very identity of which is not yet ascertained, it is suspended, and as the sale or exchange of the original property can only result in rendering the substituted property inalienable, the term of suspension must be duly limited as from the creation of the original estate. Illustrations of such cases are given in §§ 45, 46.

§ 34. (3) The third meaning of the term does not relate to suspension as applied to any particular property at all, either original or substituted, but only as applied to estates or funds, as such, as distinguished from the particular lands, securities, or other properties, in which they are, or from time to time may be, invested. Such cases exist when there is a trust or contingency sufficient, if considered alone, to cause suspension, but in fact accompanied by a continuing power to sell and re-sell, exchange and re-exchange, during the term. This power obviates suspension as to any

¹ Chapters III, IV and V.

particular property, but so long as the estate or fund itself is subject to the same trust or contingency, the absolute power of alienation, in the sense of the statute, is suspended.¹ The identity of the fund itself continues in spite of changes in the form of its investment, and is subject as such to suspension of the power of alienating it; its identity is like that which a river maintains, while its waters change, and the rules of navigation continue to apply to the river as such.²

§ 35. If the estate in question is, or becomes, personality, the term then employed, as applied to either of the three cases just considered, is "suspension of absolute ownership."³

§ 36. The "mischief" which the statute aims to prevent under the first two senses of the term in question, is different from that which it aims to prevent under the third. The general reason why suspension of the absolute alienability of particular property, original or substituted, is forbidden, beyond the "statutory period," is that it is considered undesirable in the public interest to have particular property so tied up, for an indefinite period, that in the meantime it cannot be brought upon the market; and the reason why suspension of the absolute alienability of an estate or fund, as such, is forbidden, beyond the statutory period, is that it is considered undesirable, in the public interest, to have a given amount of wealth so tied up, for an indefinite period, that in the meantime though subject to exchange, or a sort of barter, it is withdrawn from the normal condition in which, as an estate, it

¹ *Hawley v. James*, 5 *Pai.* 318, 444-5.

² *Allen v. Allen*, 149 *N. Y.* 280, 288; *Hooker v. Hooker*, 166 *N. Y.* 156; *Kalish v. Kalish*, 166 *N. Y.* 368; *Hawley v. James*, 5 *Pai.* 318, 445. Illustrations of this class are given in § 46.

³ See Chapters VII and IX.

may be *spent* and ended. Supra, §§ 20-28. For though such a suspension, if duly limited in purpose and term, may be beneficent, yet being abnormal it would tend, in the course of time, if unlimited, to become an engine for the injury of its intended beneficiaries and of the public.

§ 37. In view of the fact that the existence of "suspension of the absolute power of alienation" consists in the fact that there are "no persons in being" by whom an absolute fee in possession, in the sense already discussed, can be conveyed, it is impossible to wholly separate the two terms in the treatment of the general subject. We now have stated the general meanings of the former term, and the remainder of the discussion will be taken up in the next subdivision.

"No Persons in Being."

§ 38. "The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed."¹ This brief definition contains several elements the exact meaning of which can only be determined by careful analysis and classification of the authorities. The term "absolute power of alienation," in its several general senses, has been considered in preceding sections. The remaining points which require special study will now be examined. And in discussing these matters, it will be convenient first to state certain well settled general propositions, and afterwards to take up other features involving more complication and difficulty.

§ 39. Wherever, then, there is in being a representative for each estate, interest, right and possibility,

¹ Real Property Law, § 42.

present and future, vested and contingent, each capable of alienating, at his option, the estate or interest represented by him, there can be no suspension of the absolute power of alienation, under Rule I.¹ For the various estates, interests, and possibilities constitute amongst them the makings of an absolute fee; and if, by releases, or conveyances, these can all be consolidated in one, the consolidated estate thus formed would, of necessity, be an absolute fee in possession. In other words, in order to avoid a suspension of alienability, it is sufficient if there are persons in being who, by combining the several estates, rights, interests and possibilities that they represent or are authorized to speak for, can, if they all wish to, patch together an absolute fee.² And on the other hand, if there is any interest or possibility, which in effect constitutes part of the make-up of an absolute fee, and which for any reason is not represented by a person capable of alienating it in the

¹ § 2. But this test of validity is not applicable to Rule II. See § 4, which relates to vesting.

² *Mott v. Ackerman*, 92 N. Y. 550; *Everitt v. Everitt*, 29 N. Y. 39, 77 *et seq.*; *Emmons v. Cairns*, 3 Barb. 243, 248; *Norris v. Beyea*, 13 N. Y. 273, 289; *Greenland v. Waddell*, 116 N. Y. 234, 246; *Williams v. Montgomery*, 148 N. Y. 519; *Nellis v. Nellis*, 99 N. Y. 505, 516; *Genet v. Hunt*, 113 N. Y. 158, 172; *Wilber v. Wilber*, 165 N. Y. 451; *Wells v. Squires*, 117 App. Div. 502, *aff'd* 191 N. Y. 529; *Steinway v. Steinway*, 163 N. Y. 183; *Fowler v. Ingersoll*, 127 N. Y. 472, 477; *Murphy v. Whitney*, 140 N. Y. 541; *Mills v. Mills*, 50 App. Div. 221; *Matter of N. Y., L. & W. R. R. Co.*, 105 N. Y. 89, 96; *Garvey v. McDevitt*, 72 N. Y. 556, 563; *Farrar v. McCue*, 89 N. Y. 139, 146; *Hunter v. Hunter*, 17 Barb. 25, 90. As to the principles applicable to suspension of the absolute ownership of personal property, see Chapter VII. As to the effect of alienage, see *Real Prop. L.* §§ 10, subd. 2; 14, 15; *Decedent Estate Law*, § 13; *Hall v. Hall*, 81 N. Y. 130; *Wadsworth v. Wadsworth*, 12 N. Y. 376; *Beck v. McGillis*, 9 Barb. 35; *McGillis v. McGillis*, 154 N. Y. 532; *Haley v. Sheridan*, 190 N. Y. 331; *Hauenstein v. Lynham*, 100 U. S. 483; *Geofroy v. Riggs*, 133 U. S. 258; *Hoey v. Kenny*, 25 Barb. 396; *Dempsey v. Tylee*, 3 Duer, 73, 98, 101, 102; *De Barante v. Gott*, 6 Barb. 492; *Parker v. Linden*, 113 N. Y. 28, 37; *Hayden v. Sugden*, 48 Misc. 108; *Duke of Cumberland v. Graves*, 9 Barb. 595; *Douglass v. Douglass*, 70 Misc. 412; *Richardson v. Amsdon*, 85 N. Y. Supp. 342.

sense intended by the statute, then an absolute fee in possession cannot be conveyed, and there is a suspension of the absolute power of alienation.

§ 40. Thus, for example, a contingent future estate or interest which is so limited that by the terms of its creation it may yet vest in persons not now in being, occasions a suspension of the absolute power of alienation, because there are "no persons in being" who can effect an absolute conveyance of it.¹ And so also there are certain express trusts under which the trustee, who holds the legal title, cannot alien while the trust endures, and the beneficiaries cannot terminate the trust, and thus there is a suspension of the absolute power of alienation because, although every estate and interest may be represented by "persons in being," there are no persons in being "by whom an absolute fee in possession can be conveyed."² Similar principles also explain the relation of certain "powers" to suspension of the power of alienation.³

§ 41. In order to obviate suspension of the power of alienation, it is not necessary that all the outstanding possibilities should be capable of conveyance or assignment. It is enough that they may be released or in any manner extinguished or got out of the way, so that the fee may be cleared of all features that deprive it of its absolute character, and rendered absolute and indefeasible.⁴

§ 42. So, further, if an instrument, the provisions of which would otherwise occasion a suspension of the

¹ Chapter III.

² Chapter IV.

³ Chapter V.

⁴ *Beardsley v. Hotchkiss*, 96 N. Y. 214; *Everitt v. Everitt*, 29 N. Y. 39, 77, 78; *Miller v. Emans*, 19 N. Y. 384; *Garvey v. McDevitt*, 72 N. Y. 563; *Emmons v. Cairns*, 3 Barb. 243, 248; *Sawyer v. Cubby*, 146 N. Y. 192; *Williams v. Montgomery*, 148 N. Y. 519.

power of alienation of designated real property, also confers an unrestricted power to absolutely alien the property in fee, it follows that the power of alienation, as applied to the particular property designated in the instrument, is not suspended at all, because there are persons in being by whom an absolute fee in possession can be conveyed.¹ For it is only sales "in contravention of the trust" that are prohibited. If a sale is authorized by the instrument creating the trust, it cannot be in contravention thereof.

§ 43. And if such a power of sale is coupled with merely discretionary authority to defer an actual sale, this authority does not interfere with the effect of the power in obviating suspension. The *power* to sell is not fettered by the discretionary authority to defer execution of it;² nor by a mere suggestion that the exercise of the power be postponed;³ nor by the necessity of taking some unmeasured time in order to sell to good advantage, if the power to sell is not suspended.⁴

§ 44. And so, on the same principle, if there is an unrestricted power both to sell the original property

¹Blanchard v. Blanchard, 4 Hun, 287, aff'd 70 N. Y. 615; Belmont v. O'Brien, 12 N. Y. 394, 404-5; Haynes v. Sherman, 117 N. Y. 433, 438; Stoiber v. Stoiber, 40 App. Div. 156; Robert v. Corning, 89 N. Y. 225, 235-6, 239; Henderson v. Henderson, 113 N. Y. 1, 12; Stewart v. Hamilton, 37 Hun, 19; Hope v. Brewer, 136 N. Y. 126, 135; Deegan v. Wade, 144 N. Y. 573, 576; Betts v. Betts, 4 Abb. N. C. 317; Matter of Wilcox, 194 N. Y. 288, 305; Heermans v. Robertson, 64 N. Y. 332, and dissenting opinion of Earl, J.; Van Vechten v. Van Veghten, 8 Pal. 122; Matteson v. Armstrong, 11 Hun, 245, 249.

²Robert v. Corning, 89 N. Y. 225; Matter of Wilcox, 194 N. Y. 288, 305; Henderson v. Henderson, 113 N. Y. 1; Dillenbeck v. Dillenbeck, 134 App. Div. 720; Hope v. Brewer, 136 N. Y. 126, 135; Deegan v. Wade, 144 N. Y. 573, 576; Cruikshank v. Home for Friendless, 113 N. Y. 337.

³Chanler v. N. Y. El. R. R. Co. 34 App. Div. 305. See further Chapter V.

⁴Deegan v. Wade, 144 N. Y. 573; Chanler v. N. Y. El. R. R. Co., 34 App. Div. 305; Hope v. Brewer, 136 N. Y. 126, 135.

affected by the trust or contingency, and also thereby to entirely free the proceeds from those fetters, there the existence of the power obviates any suspension of alienability either of the original property, or of its proceeds whether regarded, in a given case, as real or personal property.¹

§ 45. It does indeed seem to have been intimated that the principle under consideration, while applicable to real property, does not apply, or applies in some wholly different sense, to personal property. This subject is discussed later on in Chapter VII. It may here be said, however, that the only real difference in the two cases seems to be this: that a power to sell the realty obviates suspension as to it, if the purpose of the sale is valid and a sale under it will not operate, or co-operate, to effect any illegal result. It would thus operate if the ownership of the proceeds, in case of a sale, and whether regarded as real or personal property,² were to remain, or become, suspended, for an unauthorized term. Therefore we must look beyond the power itself, to the purpose it is to serve, as related to the proceeds, and the discovery of that purpose, in relation to personalty, as well as realty, may show whether the power itself is or not effective to obviate suspension. If the purpose, and the method of attaining it, are valid, the power will obviate suspension, as applied to property over which it may be exercised; and if, in such a case, the only power there is, is nothing but a power to merely convert or change the form of the particular property

¹ *Robert v. Corning*, 89 N. Y. 225 (see also *Matter of Wilkin*, 183 N. Y. 104); *Marvin v. Smith*, 46 N. Y. 571; *Henderson v. Henderson*, 113 N. Y. 1, 12; *Belmont v. O'Brien*, 12 N. Y. 394, 404-5; *Stoiber v. Stoiber*, 40 App. Div. 156; *Schreyer v. Schreyer*, 101 App. Div. 456, *aff'd* 182 N. Y. 555; *Button v. Hemmens*, 92 App. Div. 40; *Stewart v. Hamilton*, 37 Hun, 19. See *Stanley v. Payne*, 65 Misc. 77. And as to the relation of a power of sale, to conversion, see Chapter IX.

² Chapter IX.

originally subjected to the trust or contingency, then it is only that particular original property that is thereby freed from suspension of the absolute power of alienation. If the proceeds of the sale are not in turn alienable, but must be held subject to the original trust or contingency, and not disposed of, then we have an illustration of the second sense, above referred to,¹ in which the term suspension of the absolute power of alienation is employed. For thus the absolute power of alienation, though retained in respect to the property designated in the instrument, is suspended in respect to property which is not yet ascertained, but which will become so in future when it is taken in payment for the original property. Yet in such cases it is settled that from the "creation of the estate" the absolute power of alienation is suspended.²

§ 46. And the same principles already considered, apply to a mere power to exchange the real property for other real property, to be held subject to the same trust; or to sell for the mere purpose of re-investment in other real property.³ And still further, and in illustration of the third sense,⁴ in which the term "suspension of the absolute power of alienation" is employed,

¹ § 33.

² Real Prop. L. § 96; Chapter VII, *infra*; Underwood v. Curtis, 127 N. Y. 523, 527; Brewer v. Brewer, 11 Hun, 147, *aff'd sub nom.* Bremer v. Penniman, 72 N. Y. 603; Hobson v. Hale, 95 N. Y. 588, 609; Cruikshank v. Home for the Friendless, 113 N. Y. 337, 352; Belmont v. O'Brien, 12 N. Y. 394, 404-5 (see dissenting opinion of Earl, J., in Heermans v. Robertson, 64 N. Y. 332, 352); Allen v. Allen, 149 N. Y. 280, 288; Haynes v. Sherman, 117 N. Y. 433, 438; Ward v. Ward, 105 N. Y. 68, 71, 73, 75; Bramhall v. Ferris, 14 N. Y. 41; Roosevelt v. Roosevelt, 6 Hun, 31, *aff'd* 64 N. Y. 651; Stoiber v. Stoiber, 40 App. Div. 156; Hagemeyer v. Saulpaugh, 97 App. Div. 535, 544; Hayden v. Sugden, 48 Misc. 108.

³ Belmont v. O'Brien, 12 N. Y. 394, 402; Brewer v. Brewer, 11 Hun, 147, *aff'd* 72 N. Y. 603; see Ward v. Ward, 105 N. Y. 68, 71; Hobson v. Hale, 95 N. Y. 588, 609; Hawley v. James, 16 Wend. 61, 163; Harris v. Clark, 7 N. Y. 242, 260.

⁴ § 34.

it is to be noticed that even though both the original property and its proceeds, or property taken in exchange, are all made always absolutely alienable, yet such suspension will nevertheless exist, if there are "no persons in being" who can free the estate or fund itself, considered as distinct from the property in which it may from time to time be invested, from the fetters which prevent the spending or dissipation of it.¹

§ 47. It is the absence of the power to alien, and not the absence of an actual exercise of the power, that causes a suspension.² If the ability to convey an absolute fee exists, there obviously cannot be said to be a suspension of the absolute power of alienation. But this general proposition must be understood accurately, and interpreted in the light of its purpose.³

§ 48. To this end, four broad propositions will serve to mark out the general lines of distinction between cases where there are, and those where there are not, in the sense of the statute, persons in being by whom an absolute fee in possession can be conveyed.

§ 49. (1) The statute, in speaking of *persons who can convey* an absolute fee, refers only to cases where there are persons authorized to completely represent and dispose of all the present and the outstanding estates, interests, rights and possibilities, and able, by

¹ §§ 33-36; *Allen v. Allen*, 149 N. Y. 280, 288; *Ward v. Ward*, 105 N. Y. 68, 71, 73, 75; *Brewer v. Brewer*, 11 Hun, 147, 151-3, *aff'd sub nom. Bremer v. Penniman*, 72 N. Y. 603; *Hobson v. Hale*, 95 N. Y. 588, 609; *Robert v. Corning*, 89 N. Y. 225, 236; *Haynes v. Sherman*, 117 N. Y. 433, 438; *Belmont v. O'Brien*, 12 N. Y. 394, 404-5; *Harris v. Strodl*, 132 N. Y. 392.

² *Robert v. Corning*, 89 N. Y. 225, 235, 239; *Henderson v. Henderson*, 113 N. Y. 1, 12; *Hunter v. Hunter*, 17 Barb. 25, 90; *Williams v. Montgomery*, 148 N. Y. 519.

³ See opinion of Nelson, Ch. J., in *Hawley v. James*, 16 Wend. 61, 122, and of Walworth Ch., S. C. 5 Pai. 318, 445.

uniting, to effectuate a conveyance of the absolute fee in possession.¹ Thus the fact that the Legislature has made provision for the sale, in certain cases, of real estate affected by contingent rights of persons not in being, does not operate to obviate a suspension due to the contingency. One reason for this is, that the proceeds of the sale must be held for those who may become entitled to them;² and thus, though the original property may be sold free from contingency, the power to alienate the estate or fund itself remains as much suspended as ever.³ Another reason is, that the Legislature is not a "person" who can "convey." If it were so in the connection under consideration, it would be so in all cases, on account of its power over trusts,⁴ and also over the very existence of any rule relating to suspension,⁵ and thus there would be no such thing as suspension of the power of alienation.⁶ So also a court is not a "person."⁷

§ 50. (2) In order to create a suspension of the power of alienation, the absence of persons in being

¹ Genet v. Hunt, 113 N. Y. 158, 172; Fowler v. Ingersoll, 127 N. Y. 472, 477; Williams v. Montgomery, 148 N. Y. 519; Nellis v. Nellis, 99 N. Y. 505, 516; and cases cited *supra*.

² Ebling v. Dreyer, 149 N. Y. 460; Mead v. Mitchell, 17 N. Y. 210; Brevoort v. Brevoort, 70 N. Y. 136; Monarque v. Monarque, 80 N. Y. 320; Kent v. Church of St. Michael, 136 N. Y. 10; Campbell v. Stokes, 142 N. Y. 23, 30; Brevoort v. Grace, 53 N. Y. 245; Kirk v. Kirk, 137 N. Y. 510; Smith v. Secor, 157 N. Y. 402; Kilpatrick v. Barron, 125 N. Y. 751; Dwight v. Lawrence, 111 App. Div. 616.

³ §§ 32-34.

⁴ Metcalfe v. Union Trust Co., 181 N. Y. 39; Pers. Prop. L. § 23.

⁵ Richardson v. Amsdon, 85 N. Y. Supp. 342.

⁶ But the State as a property owner can convey and release, and so, assuming that any question involving suspension of alienability could otherwise arise in connection, for example, with possibilities of escheat, the capacity of the State to deal with its own property would obviate the objection. As to retroactive, retrospective, or *ex post facto* laws, and the power of the Legislature, see Brearley School v. Ward, 201 N. Y. 358; Metcalfe v. Union Trust Co., 181 N. Y. 39.

⁷ § 53.

who can convey an absolute fee in possession must be occasioned by the provisions of the instrument; and also in order to obviate a suspension which such provisions would otherwise create, persons in being who can thus convey must be furnished by other provisions of the instrument. For the statute which prohibits, except within certain limits, any suspension of the absolute power of alienation, is aimed only at such suspension as is effected by the terms of the instrument creating the estate, and not at such as necessarily arises from the disability of infancy, or from other causes outside of the instrument.¹

§ 51. And the fact that a devisee in fee is at the time of testator's death a convict serving a term of years in the State prison, does not leave the title in abeyance and so effect a suspension of the power of alienation. Notwithstanding his status, the property devised can vest in him, and he can convey it.² And in the same way, a mere provision that a trust, already duly limited to the "statutory period," shall (by way of penalty) earlier cease in case the beneficiary should interfere, or make hostile claims, would not obviate suspension otherwise existing. It is true that such a provision puts it in the power of the beneficiary in a sense to end the trust, but yet he could only accomplish that result by doing something that the instrument forbids.³

§ 52. In a similar manner, it may sometimes happen, through the ordinary and appropriate application of

¹ *Beardsley v. Hotchkiss*, 96 N. Y. 201, 214; *Everitt v. Everitt*, 29 N. Y. 39, 77; *Livingston v. Tucker*, 107 N. Y. 549, 552; *Craig v. Craig*, 3 Barb. Ch. 76; *Quade v. Bertsch*, 65 App. Div. 600, 607, *aff'd* 173 N. Y. 615; *McGowan v. McGowan*, 2 Duer, 57.

² *La Chapelle v. Burpee*, 69 Hun, 436; *Avery v. Everett*, 110 N. Y. 317.

³ *Van Cott v. Prentice*, 104 N. Y. 45, 52. See also *Bramhall v. Ferris*, 14 N. Y. 41.

familiar doctrines, such as those relating to estoppel, laches, waiver, bar, acquiescence, former adjudication, compromise, and "practical construction," that beneficial interests which might, as an original question, be found indestructible by action of the beneficiary, have in reality, and through his acts, or omissions, become as unenforceable as if they had been validly transferred and extinguished.¹ The result thus produced would not, of course, flow from any theory inconsistent with the full force and effect of the statutes relating to suspension of the power of alienation; and accordingly the possibility that such a result might perchance come about would not, in any given case, obviate a suspension otherwise existing.²

§ 53. (3) The ability to convey an absolute fee must also, in order to obviate suspension, be an absolute ability, depending merely upon the unrestrained option of the persons who possess it, and not dependent upon the actual occurrence, as a condition precedent, of a specified state of facts which may or may not come into existence.

§ 54. It is settled, for instance, that assuming that a judge might, in any case, in his official capacity, and in

¹ The following may be cited from among very numerous authorities, as illustrative of the general classes mentioned. *Woodbridge v. Bockes*, 170 N. Y. 596, affirming 59 App. Div. 503; *Starr v. Starr*, 132 N. Y. 154; *Everett v. Peyton*, 167 N. Y. 117, 120; *Steinway v. Steinway*, 163 N. Y. 183; *Matter of Pruyn*, 141 N. Y. 544; *Stevens v. Melcher*, 152 N. Y. 551; *Matter of Straut*, 126 N. Y. 201; *Culross v. Gibbons*, 130 N. Y. 447, 454; *Sweeney v. Warren*, 127 N. Y. 426, 435; *St. John v. Andrews Institute*, 192 N. Y. 382; *Spofford v. Pearsall*, 138 N. Y. 57; *Haviland v. Willets*, 141 N. Y. 35; *Jewett v. Schmidt*, 108 App. Div. 322, aff'd 184 N. Y. 608; *Leavitt v. Wolcott*, 95 N. Y. 212, 219-222; *Code Civ. Pr. § 1537*; *Corley v. McElmeel*, 149 N. Y. 228; *Bowen v. Sweeney*, 89 Hun, 359, aff'd 154 N. Y. 780; *Thorn v. De Breteuil*, 179 N. Y. 64.

² *Woodbridge v. Bockes*, 170 N. Y. 596, affirming 59 App. Div. 503. Compare *Bliven v. Robinson*, 83 Hun, 208, 209, 70 N. Y. 615; *Douglas v. Cruger*, 80 N. Y. 15; *Baltes v. Union Trust Co.*, 180 N. Y. 183.

the exercise of his judicial discretion, give such a consent as would render it possible for those interested, to convey a fee otherwise inalienable, this would not suffice. One reason given for this proposition is, that the judge's judicial action could not be brought in any sense within the term "conveyance." It could not properly be said that he and they together constituted persons in being capable of conveying a fee. For his consent must come first, and act not as a conveyance, but as a collateral condition precedent, to impart to the others a power not thitherto possessed by any one.¹ No court possesses the power to compel a trustee to consent to the destruction of a valid trust,² or to destroy such a trust even upon the petition of the trustee and beneficiary.³ But there is another and much more weighty reason, namely, that the court cannot consent arbitrarily; it must decide in accordance with the merits of the case as they may appear; and accordingly it is not certain that the facts will be such as to make it permissible to grant the consent.⁴

§ 55. On the other hand, however, though still illustrating the same principle, it is also settled that if a given power of sale is such as in itself to obviate a suspension which would otherwise exist, its efficiency in that respect is not negatived by the fact that by its terms it can only be exercised upon the consent of a designated person, if the latter is free, as he may see fit, to grant the consent or withhold it. The distinction

¹ *Genet v. Hunt*, 113 N. Y. 158, 172; *Fowler v. Ingersoll*, 127 N. Y. 472, 477; *Button v. Hemmens*, 92 App. Div. 40. See *O'Donaghue v. Smith*, 184 N. Y. 365, 374; *Matter of Asche*, 75 App. Div. 486.

² *Cuthbert v. Chauvet*, 136 N. Y. 326; *Rochevot v. Rochevot*, 74 App. Div. 585, 590.

³ *Douglas v. Cruger*, 80 N. Y. 15, 19. Compare the statutory provision in *Pers. Prop. L. § 23*.

⁴ *Button v. Hemmens*, 92 App. Div. 40, 43; *Genet v. Hunt*, 113 N. Y. 158, 172; *Fowler v. Ingersoll*, 127 N. Y. 472, 477.

between such a consent, and the consent of the court, and the difference in their bearing upon the question of suspension, are found in the fact that in the one case the power to consent is absolute, and in the other merely conditional.¹

§ 56. Where an instrument containing provisions which would otherwise effect a suspension, confers upon the trustee, instead of a power to sell or exchange, as in cases already discussed, an unrestricted authority, at any time, at his option, to reconvey the property absolutely to the original grantor,² or to "terminate the trust,"³ the authority is valid, enables the trustee to act accordingly, and apparently, under the ruling in *Robert v. Corning*,⁴ obviates, during the period when the power exists and may be exercised, any suspension of the power of alienation.⁵ The same principle applies to a power of appointment exercisable at any time without restriction, and then to operate to terminate a state of facts which, but for the existence of the power, would occasion suspension;⁶ and apparently to an unrestricted power, reserved to the grantor by the terms of an instrument creating a trust measured by the grantor's life, to revoke the trust.⁷ In that case, the instru-

¹ *Stoiber v. Stoiber*, 40 App. Div. 156, 159; *Matter of Wilcox*, 194 N. Y. 288, 305; Real Prop. L. §§ 173, 174; *Spitzer v. Spitzer*, 38 App. Div. 436; *Matter of Vanderbilt*, 20 Hun, 520. As to the effect of the death of the person whose consent is required, see Real Prop. L. § 174; *Schreyer v. Schreyer*, 101 App. Div. 456, aff'd 182 N. Y. 555; *Matter of Vanderbilt*, 20 Hun, 520, 526; *Kissam v. Dierkes*, 49 N. Y. 602.

² *Schreyer v. Schreyer*, 101 App. Div. 456, aff'd 182 N. Y. 555.

³ *Higgins v. Downs*, 101 App. Div. 119; *Crooke v. County of Kings*, 97 N. Y. 421, 447.

⁴ *Robert v. Corning*, 89 N. Y. 225, 236.

⁵ *Belmont v. O'Brien*, 12 N. Y. 394, 404-5; *Voorhis v. Voorhis*, 66 Misc. 78; *Mt. Morris Co-op. Building & Loan Assn. v. Smith*, 120 N. Y. Supp. 676.

⁶ *Matter of Wilcox*, 194 N. Y. 288.

⁷ Real Prop. L. §§ 144, 145, 148.

ment itself provides means for vesting an absolute title at any time, free from the trust, and it would seem that the trust, though valid, should not be deemed to effect any suspension.¹ A revocation is not in "contravention of the trust,"² nor is any such act by the grantor, under such an instrument, prohibited by statute. But a power of revocation can of course have such a bearing on the question of suspension only during the life of the person who can exercise it. After his death, and as then applied to a further trust, it can have no effect.³

§ 57. Another illustration of the principles under consideration may be found in a case involving authority to a trustee to convey to the beneficiary, free from the trust, if he should then have discharged all his debts, and be in the judgment of the trustee entirely solvent. It was assumed by the court, without deciding, that the conditions prescribed by the testator, upon which the trustee might terminate the trust, were conditions precedent to such termination.⁴ And in *Spitzer v. Spitzer*,⁵ the trust was to continue until the property should be sold; and the trustee was directed to sell within two years, but not for less than \$18,500 without the written consent of designated persons. The fact

¹ *Belmont v. O'Brien*, 12 N. Y. 394, 404-5; *Schreyer v. Schreyer*, 101 App. Div. 456, aff'd 182 N. Y. 555; *Brown v. Spohr*, 180 N. Y. 201; *Matter of Masury*, 28 App. Div. 580, aff'd 159 N. Y. 532 (compare *Matter of Bostwick*, 160 N. Y. 489); *Von Hesse v. MacKaye*, 136 N. Y. 114, 119; *Barnard v. Gantz*, 140 N. Y. 249, 259; *Towler v. Towler*, 142 N. Y. 371, 375; *Kissam v. Dierkes*, 49 N. Y. 602.

² § 183.

³ See *Van Cott v. Prentice*, 104 N. Y. 45; *Locke v. F. L. & T. Co.* 140 N. Y. 135. See also the new statutory provision authorizing the creator of a trust of personal property, upon the consent of all those who are beneficially interested thereunder, to terminate the trust. *Pers. Prop. L.* § 23, and *infra* § 399.

⁴ *Young v. Young*, 127 App. Div. 130; compare *Cushman v. Cushman*, 116 App. Div. 763, aff'd 191 N. Y. 505; *Roosevelt v. Roosevelt*, 6 Hun, 31, aff'd 64 N. Y. 651, "substantially on opinion below."

⁵ 38 App. Div. 436.

that with their consent he could sell for less, operated to obviate any suspension, but the court say that if it had not been for that feature, "the trust would be illegal because it might be that the executor never could obtain that price."¹

§ 58. (4) The ability to convey a fee must, in order to obviate suspension of the absolute power of alienation of real property, consist in the existence of legal capacity and ability in one or more persons, to perform an act relating directly to the clearing and the transfer of title, and sufficient to effectuate the vesting of an absolute fee in possession. This is, perhaps, only another form of stating the principle substantially embodied in the preceding subdivision (3). For if the act which the person in question is able to perform does not answer to a "conveyance," in the sense already discussed, its performance could at most only operate as the happening of a condition precedent, rendering a conveyance possible. But the bare power to do an act not connected with any transfer of an absolute title, which only operates indirectly to put it in the power of others thereafter to convey or to require a conveyance, or a termination of the suspension, and which must be performed first before they can act, is not in itself the absolute power of alienation which the statute contemplates. This may be best illustrated by a statement of certain cases where the beneficiary of an express trust to receive and apply rents and profits, is sometimes able, by indirection, to bring about a total or partial failure of the trust, and yet, while the trust continues, the power of alienation is suspended.

§ 59. Thus, in connection with the several principles thus far discussed, we are now brought to the considera-

¹ And this is so held in *Stewart v. Woolley*, 121 App. Div. 531. Chapter VII.

tion of the bearing upon the existence of suspension of the power of alienation, of ability on the part of the beneficiary himself,—in so far as such ability may exist—to bring the trust to an end; thus involving consideration of the beneficiary's status as a "person in being" who can "convey."

§ 60. Under the ordinary forms of trust to receive and apply income, where the trustee is forbidden by law to convey in contravention of the trust, the beneficiary does not figure as such a "person." He does not hold the title, and cannot convey it; and his interest as a beneficiary, by assigning or releasing which, if he could do so, he might terminate the intended purpose of the trust and so end the trust itself and effect a vesting of absolute title somewhere, he cannot in reality assign or release because he also is forbidden by law to do so. Even when, in special cases, the law does recognize the beneficiary's ability to do acts which may indirectly bring about a termination of his further actual beneficial interest, it does not follow that this answers the requirements of the statute, as already enumerated, or constitutes ability to convey, in the sense of the statute, so as to obviate suspension otherwise existing. This is illustrated, for example, in the particular class of trusts to receive and apply rents and profits, or income, in which the creator of the trust is also the beneficiary. In such cases the statutory prohibition against transfer of beneficial rights has no application,¹ and the beneficiary may accordingly assign, yet the trust itself continues, and the trustee, at least for the time being, and until other disposition is made by the court, and possibly permanently throughout the original term of the trust, retains the legal title, subject to the statutory provision against alienation by him, in contraven-

¹ *Schenck v. Barnes*, 156 N. Y. 316.

tion of the trust; and in consequence the trust, like any other trust to receive and apply rents and profits, occasions a suspension of the power of alienation.

§ 61. In *Genet v. Hunt*,¹ the trust was created by the grantor for her own benefit, and it was, in order to justify one of the two grounds on which the decision was based, strictly essential to find that that trust operated, during the grantor's life, to suspend the absolute power of alienation. This the court does, holding that the trust for the life of the grantor “was one of the express trusts authorized by statute to receive the rents and profits of lands and apply them to the use of any person during the life of such person, or for a shorter period (1 R. S. 728, § 55, subd. 3) [Real Prop. L. § 96] and suspended the power of alienation of the real estate and the absolute ownership of the personal property embraced in the trust, during the trust term, * * *. Neither she alone, or in conjunction with the trustees, could abrogate the trust.”² A similar situation may exist where a trust is created by a person other than the beneficiary and is to continue only until a creditors' bill is filed, or until judgment entered etc.³

§ 62. Another reason, or another form of stating the reason, for this result, is found in the proposition set forth above, that even if the acts of such a beneficiary can in any case lead to a termination of the trustee's title, and the vesting of an absolute fee in possession somewhere, yet those acts would constitute a mere condition precedent, and not a conveyance.⁴

¹ 113 N. Y. 158, 168.

² Compare *Wainwright v. Low*, 132 N. Y. 313, 319.

³ *Bramhall v. Ferris*, 14 N. Y. 41.

⁴ The statutes in point, relating to creditors' rights, are as follows: Real Prop. L. § 98, 103; Code Civ. Proc. §§ 1391, 1871, 1873, 1879, 2463; Pers. Prop. L. §§ 11, 15, 34; *Matter of Ungrich*, 201 N. Y. 415; *Brearley School*

§ 63. In addition to special statutory provisions like those intended to protect in proper cases the rights of

v. Ward, 201 N. Y. 358. Illustrative cases relating to creditors' rights may be conveniently classified as follows:

(a) Rights of creditors where the trust was created by some one other than the beneficiary; *Brearley School v. Ward*, 201 N. Y. 358; *Wetmore v. Wetmore*, 149 N. Y. 520, 527, 529, and also 162 N. Y. 503; *Matter of Ungrich*, 201 N. Y. 415; *N. T. Bank v. Wetmore*, 124 N. Y. 241; *Schenck v. Barnes*, 156 N. Y. 316, 320; *Ullman v. Cameron*, 186 N. Y. 399; *Williams v. Thorn*, 70 N. Y. 270; *Graff v. Bonnett*, 31 N. Y. 9; *Everett v. Peyton*, 167 N. Y. 117; *Sherman v. Skuse*, 166 N. Y. 345; *Bergmann v. Lord*, 194 N. Y. 70; *King v. Irving*, 103 App. Div. 420; *Sloane v. Tiffany*, 103 App. Div. 540; *Howard v. Leonard*, 3 App. Div. 277; *Bunnell v. Gardner*, 4 App. Div. 321; *Kilroy v. Wood*, 42 Hun, 636; *Tolles v. Wood*, 1 Abb. N. C. 1, 16, and 99 N. Y. 616; *Andrews v. Whitney*, 82 Hun, 117; *McEvoy v. Appleby*, 27 Hun, 44; *Bramhall v. Ferris*, 14 N. Y. 41; *Wetmore v. Truslow*, 51 N. Y. 338; *Locke v. Mabbitt*, 3 Abb. Ct. App. Dec. 68; *DeGraw v. Clason*, 11 Pai. 136; *Rider v. Mason*, 4 Sandf. Ch. 351; *Genet v. Beekman*, 45 Barb. 382; *Hallett v. Thompson*, 5 Pai. 583; *Raymond v. Tiffany*, 59 Misc. 283; *Congdon v. Lee*, 3 Edw. Ch. 304; *Scott v. Nevius*, 6 Duer, 672; bearing of the several statutes on trusts of real and of personal property: *Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 N. Y. 616, 1 Abb. N. C. 1; *Wetmore v. Wetmore*, 149 N. Y. 520, 527; *Schenck v. Barnes*, 156 N. Y. 316; *Kene v. Hill*, 102 App. Div. 370; *Newton v. Jay*, 107 App. Div. 457; *Delaney v. Valentine*, 154 N. Y. 692; *Pers. Prop. L. § 11*; non-assignability by the beneficiary; *Butler v. Baudouine*, 84 App. Div. 215, aff'd 177 N. Y. 530 (compare *Brown v. Barker*, 68 App. Div. 592); *Dittmar v. Gould*, 60 App. Div. 94; *Wetmore v. Wetmore*, 149 N. Y. 520; *Levey v. Bull*, 47 Hun, 350; *Manning v. Evans*, 19 Hun, 500; *Sherman v. Tucker*, 60 App. Div. 127; *Matter of Seymour*, 76 App. Div. 300; *Bergmann v. Lord*, 194 N. Y. 70, 75, and see the present wording of the Bankruptcy Act.

(b) Cases where the beneficiary is the person who created the trust; *Gilman v. McArdle*, 99 N. Y. 451, 457; *Townshend v. Frommer*, 125 N. Y. 446, 454-5; *Schenck v. Barnes*, 156 N. Y. 316, 320; *Young v. Heermans*, 66 N. Y. 374; *Newton v. Jay*, 107 App. Div. 457; *Livingston's Petition*, 34 N. Y. 555; *Kene v. Hill*, 102 App. Div. 370; *Newton v. Hunt*, 134 App. Div. 325, 201 N. Y. 559; (see *Noyes v. Blakeman*, 6 N. Y. 567); *Raymond v. Harris*, 84 App. Div. 546; *Myer v. Thompson*, 35 Hun, 561; *Congdon v. Lee*, 3 Edw. Ch. 304; *Douglas v. Cruger*, 80 N. Y. 15; *Baltes v. Union Trust Co.* 180 N. Y. 183; *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266, and where, in such cases, the trust relates to personal property; *Pers. Prop. L. §§ 11, 34*; *Curtis v. Leavitt*, 15 N. Y. 9, 114, 123, 147, 149, 176, 204, 295; *Delaney v. Valentine*, 154 N. Y. 692, 701.

creditors, and operating only by indirection upon the actual right of the beneficiary to assign, there might exist statutes specifically authorizing the beneficiary, in given cases, to end the trust, and acquire, or convey, absolute title to the property.¹ Thus while, under the general statutory scheme, the acquisition by the beneficiary of a trust, of the remainder limited thereon, will not, in the absence of a statute effecting such a result, cause, or render possible, a termination of the trust, which continues as if the remainder were owned by a third person,² yet a contrary result might be provided for by statute. Indeed, in New York in 1893, a statutory provision was enacted, authorizing the release of beneficial interest under a trust, in certain cases, by a beneficiary entitled to the remainder, and the consequent termination of the trust itself,³ and it was held in *Mills v. Mills*,⁴ that the resulting ability of such a beneficiary to effectuate, if he should choose, the vesting of an absolute fee, free from the trust, wholly obviated the existence of any suspension, because the statute rendered him a person in being who could convey an absolute fee in possession. From that proposition, if correct, it follows, although that particular statute was later repealed, that inalienability by the trustee will not occasion suspension if only in a given case the

¹ *Leggett v. Hunter*, 19 N. Y. 445, 460; *Brearley School v. Ward*, 201 N. Y. 358, 369.

² *Raymond v. Rochester Trust & Co.*, 75 Hun, 239; *Martin v. Pine*, 79 Hun, 426; *Howland v. Clendenin*, 134 N. Y. 305, 310.

³ L. 1893, Ch. 452, later embodied in Real Prop. L. of 1896, and Pers. Prop. Law of 1897, with changes of phraseology affecting the bearing on then existing trusts, both provisions so far as relating to this subject being repealed by L. 1903, Ch. 87 and 88, without affecting then existing rights. *Metcalf v. Union Trust Co.*, 181 N. Y. 39; *Matter of U. S. Trust Co.*, 175 N. Y. 304; *Connolly v. Connolly*, 122 App. Div. 492; *Thall v. Dreyfus*, 84 App. Div. 569; *Mills v. Mills*, 50 App. Div. 221; *Oviatt v. Hopkins*, 20 App. Div. 163; *Fowler's Real Prop. L.* § 103.

⁴ 50 App. Div. 221.

beneficiary is directly and validly authorized to execute an instrument which will operate to divest the trustee's title and free the estate from the fetters of the trust. It follows also, on the same assumption, that the Legislature can effect such a situation; and might, if it saw fit, enable the owner of property, in creating a trust such as by itself to occasion suspension, to authorize any beneficiary to effectuate a termination of the trustee's title in his own favor, with the result that such a trust, so terminable, would not occasion suspension. Accordingly, if the Legislature might do this, the only question, in determining in a given case whether an instrument purporting to give such authority does have that result, is whether, under the controlling statute, the Legislature has in reality enabled the creator of a trust to create it in that form and with that terminable nature.

§ 64. On this subject there might be at least four possible views, as follows:

§ 65. (1) That such an authority in the beneficiary, operates merely as a power to perform a condition precedent which, when performed, will fix the natural limit of the trust term, so that the trust, instead of being cut short, will merely expire by limitation, and an absolute fee would thus be indirectly effectuated; but in the meantime neither the trustee nor anyone else can convey, and accordingly a suspension exists. In *Marvin v. Smith*,¹ the court treated as valid both a trust to receive and apply rents and profits, and an accompanying power to the beneficiary to direct a sale by the trustee and in that event to receive the proceeds for her own disposal. But the question of whether or

¹ 46 N. Y. 571.

not such a scheme would in any sense involve a suspension, or obviate it, was not in issue or discussed.¹

§ 66. (2) That a power to convey, or to require the trustee to convey, is such a power as may, while the trustee continues to hold the title, be vested in the beneficiary as well as in any other person; that the exercise of it is not such a transfer of the beneficial interest as is prohibited by statute; that it is in effect such a power as entirely obviates any suspension otherwise existing; and that accordingly the term of a trust accompanied by such a power need not be limited to two lives in being.²

§ 67. (3) That an absolute right in the beneficiary to possession, control and disposition, renders the trust inoperative from the beginning. And such is apparently the case where the power given to the beneficiary is the main and controlling feature of the scheme. In such cases no question of suspension can arise.³ In *Ullman v. Cameron*,⁴ however, it was considered possible that while void as to the beneficiary's creditors, such a trust would not necessarily be void as to others, if active in form.

§ 68. (4) That on the other hand, if the controlling features of the scheme are the trustee's title to the property, and his exclusive power of control and disposition for the valid purposes of one of the authorized express trusts, then any mere nominal provisions purporting to

¹ Also Matter of Farmers' Loan & Trust Co, 65 Misc. 418; *Young v. Young*, 127 App. Div. 130; *Van Cott v. Prentice*, 104 N. Y. 45, 52-3.

² As to this see § 173.

³ Real Prop. L. §§ 92, 93; Opinion of Nelson, J., in *Coster v. Lorillard*, 14 Wend. 265, 333; *Wendt v. Walsh*, 164 N. Y. 154; *Wainwright v. Low*, 132 N. Y. 313, 319; *Crooke v. County of Kings*, 97 N. Y. 421, 433; *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266, 280, 281.

⁴ 186 N. Y. 339, 346.

give to the beneficiary powers inconsistent with the proposed scheme and its essential statutory requisites, will not necessarily destroy the entire plan.¹ In that view, such a power in the beneficiary would be nothing other than the very power to transfer his rights, which is forbidden by statute. If this view is correct, it necessarily follows that the direct grant of the power by the instrument is inoperative, the trust stands, and suspension exists. For while the Legislature has the power, by general or special act, to remove the statutory inability of the beneficiaries of even an existing trust under Real Property Law, § 103,² yet in the absence of any such action the statutory prohibition against transfers of beneficial interest by the beneficiary is absolute and unqualified, and is a restriction not upon the person but upon the interest, so that an express permission in the instrument cannot override the statutory prohibition.³ It would appear inconsistent with a legislative intent thus strictly construed, to hold that nevertheless the same end might in substance be attained by providing not for a right to assign the beneficial interest, but for a right to convey the title as donee of a power, or to require its conveyance by another.

§ 69. In all the cases considered, the exact result that follows such an attempt depends partly upon the emphasis which the creator of the estate apparently intended to lay on respective elements of his scheme,⁴

¹ *Crooke v. County of Kings*, 97 N. Y. 421, 433-4; *Van Cott v. Prentice*, 104 N. Y. 45, 53.

² *Leggett v. Hunter*, 19 N. Y. 445, 460; *Brearley School v. Ward*, 201 N. Y. 358, 369.

³ Opinion of Nelson, J., in *Coster v. Lorillard*, 14 Wend. 265, 333; *Crooke v. County of Kings*, 97 N. Y. 421, 433; *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266, 280-281.

⁴ *Crooke v. County of Kings*, 97 N. Y. 421, 433-4.

and the resulting effect on the scheme as a whole of a finding that given elements are invalid. But it can be said that the weight of the principles and authorities is heavily in favor of the view that, according to the classification given above, such powers in the beneficiary cannot be sustained merely as a valid means of ending the term without obviating suspension in the meantime, or as a valid means of obviating suspension without nullifying the trust, but are, in given cases, either void, or operate, by their existence, to vitiate the trust and vest absolute title in the beneficiary or in others.

§ 70. The question of whether, in order to obviate a charge of suspension of the power of alienation, the number of the "persons in being" who, by uniting, could effect a conveyance of an absolute fee must, by the provisions of the original instrument, be kept within any limits whatever, has apparently not arisen under our statute. A somewhat similar question has been considered in reference to "lives in being" under the common law Rule against Perpetuities. There it has been said that the number employed to measure the term must not exceed that to which testimony can be applied, to determine when the survivor of them dies; but no specific limit has been fixed.¹ So in regard to "persons in being" who can convey, in New York, the number relied on to avoid suspension might in a given case be so large that testimony could not determine whether all had united, or not. There is no fixed limit, but there seems to be no doubt that if the question were presented in a given case, it would be necessary, in order to sustain the validity of the instrument, to satisfy the court that the individual members of the class relied on as

¹ Gray, *Perpetuities*, 2nd Ed. § 219 *a*; Challis, *Real Property*, 148.

able to convey, were, or by the end of the statutory period would be, capable of identification.

The "Statutory Period."

§ 71. Each of the three Rules already stated, two of which relate directly to real property, while the other relates to personal property, employ the term "statutory period," to designate the authorized term of suspension, or of postponement of vesting. The maximum period thus permitted is not the same, as applied to real and to personal property,¹ but in other respects the subject of the "statutory period," as applied to the several cases, may be conveniently taken up in this subdivision.

The "Creation of the Estate."

§ 72. In all cases, the duration of the "statutory period," is computed from the date of the creation of the estate, interest or possibility which occasions the suspension or postponement.² The date of creation in the case of a grant, is the time of the delivery of the grant; and in the case of a will, the death of the testator.³ A special rule relating to powers, is stated in Chapter V.

§ 73. From these propositions it follows, and is now well settled, that though a scheme of disposition as set

¹ Chapter VII.

² Real Prop. L. § 42; Pers. Prop. L. § 11.

³ Real Prop. L. §§ 64, 92, 244; *Matteson v. Palser*, 173 N. Y. 404, 411-12; *Matter of Raymond*, 73 App. Div. 11; *Fargo v. Squiers*, 154 N. Y. 250. For the cases dealing with the term of suspension occasioned by an instrument in execution of a power, see Chapter V, and for special features relating to the term of suspension occasioned by express trusts, see Chapter IV. As to chattels real, and "dispositions of rents and profits," see Real Prop. L. §§ 33; 49; 60; as to personal property, see Pers. Prop. L. § 11. The mere fact that an expectant estate created by grant is to begin in possession at the grantor's death, does not render the instrument testamentary in character. *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 493.

forth in a will may be such that it would be invalid if the testator should die while the facts existing at the date of execution of the will still continued to exist, as for example a trust for the receipt and application of rents and profits, created by the will of a testator having three children, to continue until the death of all his children; yet the same identical scheme may prove valid if, before his death, the facts have changed, as for example, in the case supposed, if one of the children had in the meantime died. For at the time of testator's death, which is the time as from which the will speaks, there would only be two persons then in being whose lives would measure the term.¹

"Two Lives in Being."

§ 74. As this statutory term² applies equally and in the same sense, to suspension occasioned by contingencies, trusts and powers in trust; to postponement of

¹ Griffen v. Ford, 1 Bosw. 123, 137; Lang v. Ropke, 5 Sandf. S. C. 363; Lang v. Wilbraham, 2 Duer, 175; Eels v. Lynch, 8 Bosw. 465, 475; Oxley v. Lane, 35 N. Y. 340, 344, 346; Matteson v. Palser, 173 N. Y. 404, 411, 412; Coston v. Coston, 118 App. Div. 1, 3; Benedict v. Webb, 98 N. Y. 460, 465; Matter of Raymond, 73 App. Div. 11; Matter of Pillsbury, 50 Misc. 367, aff'd 113 App. Div. 893, aff'd 186 N. Y. 545. Also Hughes v. Mackin, 16 App. Div. 291; Matter of Chapman, 133 App. Div. 337, appeal dismissed, 196 N. Y. 561; Matter of Hoffman, 201 N. Y. 247; Graham v. Graham, 49 Misc. 4; Tallman v. Tallman, 3 Misc. 465; Galway v. Bryce, 10 Misc. 255, 257; McArthur v. Scott, 113 U. S. 340, 382, and many other cases cited in Gray, Perpetuities, 2nd Ed., § 231. This principle is also accepted in the English cases, Farwell on Powers, 1st Ed. p. 226; Lewis, Perpetuities, 27, and supplement, 53-57; Gray, Perpetuities, 2nd Ed., § 231; Marsden, Rule against Perpetuities, 67; Dungannon v. Smith, 12 Cl. & F. 546; Southern v. Wollaston, 16 Beav. 166, 276; Hale v. Hale, 3 Ch. D. 643, 645; McArthur v. Scott, 113 U. S. 340, 382; 4 Kent Comm., 12th Ed., 283, note 1, citing cases. The cases of Hawley v. James, 16 Wend. 61, 120, and Odell v. Youngs, 64 How. Pr. 56, are *contra*, and are now overruled, and the decisions on which the opinion in the latter case is based, have no bearing on the point.

² Real Prop. L. § 42; Pers. Prop. L. § 11.

vesting, and to suspension of the absolute ownership of personal property, cases representing all these classes will here be cited indiscriminately.

Two Lives the Necessary Measure. Exception.

§ 75. In all these cases, the term of suspension, or the term of postponement of vesting of remainders, as the case may be, must be bounded strictly by not more than two designated lives, in being at the "creation of the estate,"¹ except only in the particular cases, relating solely to real property, where the suspension, or the postponement of vesting, is by statute permitted to continue during a further minority, a subject which is discussed in later sections.

§ 76. Thus it will not answer to provide that the suspension shall continue during "the time prescribed by the statute governing perpetuities." The statute prescribes no time. It requires the grantor or testator to designate lives in being.² And no term of years, however short, will satisfy the statute.³ So it is not permissible to provide for a suspension or postponement measured without reference to one or to two lives in

¹ *Fargo v. Squiers*, 154 N. Y. 250; *Henderson v. Henderson*, 113 N. Y. 1; *Hawley v. James*, 16 Wend. 61, 127 *et seq.*; and 169 *et seq.*; *Woodgate v. Fleet*, 64 N. Y. 566, 572; *Matter of Wilcox*, 194 N. Y. 288; *Real Property Law*, § 42; *Pers. Prop. L.* § 11; and as to postponement of vesting, the statutes cited in Chapter VI. And in determining whether, in a given case, the number of lives by which the term is measured may exceed two, or may be those of persons not in being at the creation of the estate, the law will not assume that any living person is too old to have children born in future. *Miller v. Macomb*, 26 Wend. 229, 234; *Taggart v. Murray*, 53 N. Y. 233, 239; *Gray*, *Perpetuities*, 2nd Ed., § 215.

² *Matter of Mead*, 27 State Rep. 36; *Matter of Fisher*, 8 N. Y. Supp. 10; *Simpson v. Cook*, 24 Minn. 180.

³ *Underwood v. Curtis*, 127 N. Y. 523, 538 (as to which case see Chap. VII); *McGuire v. McGuire*, 80 App. Div. 63; *Farmers' Loan & Trust Co. v. Cummings*, 108 N. Y. Supp. 882.

being;¹ or for twenty-one years;² or until a partition shall be actually effected;³ or until, within two years, a sum shall be raised sufficient to pay off a mortgage;⁴ or until, from the rents, a mortgage on the property shall be satisfied;⁵ or until the twenty-first anniversary of a designated minor's birth, irrespective of whether he shall live to come of age or not;⁶ or for a specified term of years;⁷ or until any fixed future date;⁸ or for a number of lives more than two;⁹ or during the life

¹ *Edson v. Fairchild*, 154 N. Y. 199; *Rice v. Barrett*, 102 N. Y. 161, 164; *Tucker v. Tucker*, 5 N. Y. 408, 417; *Smith v. Edwards*, 88 N. Y. 92; *Beekman v. Bonsor*, 23 N. Y. 298, 316; *Phelps' Ex'r v. Pond*, 23 N. Y. 69; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108, 113; *Bean v. Bowen*, 47 How. Pr. 306; *DeWolf v. Lawson*, 61 Wis. 469; *Morgan v. Masterton*, 4 Sandf. 442, 449.

² *Hone's Executors v. Van Schaick*, 20 Wend. 564; *Farrand v. Pettit* (Mich.), 48 N. W. Rep. 156; and see *Lee v. Tower*, 124 N. Y. 370; S. C. 26 N. E. Rep. 943, giving General Term opinion approved in court above.

³ *Henderson v. Henderson*, 113 N. Y. 1, 15.

⁴ *Booth v. Baptist Church*, 126 N. Y. 215, 241; *Killam v. Allen*, 52 Barb. 605; *Dresser v. Travis*, 39 Misc. 358, aff'd 87 App. Div. 632.

⁵ *Dodsworth v. Dam*, 38 Misc. 684.

⁶ *Walsh v. Waldron*, 63 Hun, 315, aff'd 135 N. Y. 650.

⁷ *Kalish v. Kalish*, 166 N. Y. 368; *Lee v. Tower*, 124 N. Y. 370, approving opinion below, given in 26 N. E. Rep. 943; *Walter v. Walter*, 60 Misc. 383, aff'd 133 App. Div. 893, aff'd 197 N. Y. 606; *Matter of Phillips*, 56 Misc. 96; *Matter of Snyder*, 21 N. Y. Supp. 430; *Donaldson v. American Tract Society*, 1 T. & C., Addenda, p. 15; *Brandt v. Brandt*, 13 Misc. 431.

⁸ *DeKay v. Irving*, 5 Den. 646, 652; *Staples v. Hawes*, 39 App. Div. 548; *Trowbridge v. Metcalf*, 5 App. Div. 318, aff'd 158 N. Y. 682.

⁹ *Almstaedt v. Bendick*, 47 App. Div. 265; *La Farge v. Brown*, 31 App. Div. 542; *Haug v. Schumacher*, 166 N. Y. 506, 512; *Bindrim v. Ullrich*, 64 App. Div. 444, app. dismissed, 173 N. Y. 587; *Leavitt v. Wolcott*, 95 N. Y. 212, 218; *Persons v. Snook*, 40 Barb. 144, 155; *Ward v. Ward*, 105 N. Y. 68; *Colton v. Fox*, 67 N. Y. 348; *Thorn v. Coles*, 3 Edw. Ch. 330; *McSorley v. Leary*, 4 Sandf. Ch. 414; *Shipman v. Rollins*, 98 N. Y. 311, 330; *Richards v. Moore*, 5 Redf. 278; *Hobson v. Hale*, 95 N. Y. 588, 597, 610, 612, 616; *Storm v. Storm*, 4 St. Rep. 670, aff'd 113 N. Y. 646; *Matter of Russell*, 5 Dem. 388; *Fowler v. Ingersoll*, 127 N. Y. 472; *Giraud v. Giraud*, 58 How. Pr. 175; *Bean v. Hockman*, 31 Barb. 78; *Van Vechten v. Van Vechten*, 8 Pal. 104; *Jennings v. Jennings*, 7 N. Y. 547; *Schnarr v. Henning*, N. Y. Daily Reg. Dec. 23, 1882; *O'Brien v. Mooney*, 5 Duer, 51.

of a person as yet unborn;¹ or until all of several minors, more than two, reach majority;² or until the youngest, of more than two, to reach majority, shall do so;³ or to continue, under any designation, after two lives in being, except in the special case covered by Real Property Law, § 42;⁴ or in perpetuity.⁵

§ 77. But if a testator, after making a void disposition of his property, provides an alternative disposition, valid in itself, in the event that the first should be adjudged or prove invalid or its execution impossible, by judicial decision, this alternative disposition will not be void on the ground of attempting to effect a suspension for an indefinite period, namely, until a judicial decision is reached on the validity of the first disposition. The judgment does not create the validity or invalidity. The second scheme of disposition takes effect *instantly* on testator's death, if as a matter of fact the first is void. The subsequent decision of the court does not effect any result at its own date other than to ascertain what did happen at testator's death.⁶

¹ Matter of Martial, 15 N. Y. Supp. 89; Matter of Faile, 44 Misc. 619.

² Hawley v. James, 16 Wend. 61; Matter of Butterfield, 133 N. Y. 473; Brown v. Quintard, 177 N. Y. 75; Ahearn v. Ahearn, 52 App. Div. 356; Matter of Lally, 136 App. Div. 781, aff'd 198 N. Y. 608.

³ Levy v. Hart, 54 Barb. 248; see also Matter of Martial, 15 N. Y. Supp. 89.

⁴ Cowen v. Rinaldo, 82 Hun, 479.

⁵ Walker v. Taylor, 15 App. Div. 452; Guental v. Guental, 113 App. Div. 310; Matter of Dewitt, 113 App. Div. 790, aff'd 188 N. Y. 567. See also Matter of Trotter, 182 N. Y. 465; Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86; Schlereth v. Schlereth, 173 N. Y. 444; Matter of Wilcox, 194 N. Y. 288. Although the will in Beers v. Grant, 110 App. Div. 152, as construed, would evidently effect a suspension of alienability for one life plus one moment, it should be clear that the decision was not intended to support any such proposition; the question does not seem to have been raised, and the result arrived at could be fully supported by another form of statement, without involving this difficulty, and the affirmation, 185 N. Y. 533, without opinion, lends no weight to a mere form of expression below.

⁶ Cruikshank v. Home for the Friendless, 113 N. Y. 337.

Designation of the Lives.

§ 78. Although both of the lives by which the duration of a term is to be measured, must be "in being" at the creation of the estate, it is not necessary that the lives should be expressly named, as such, as the measure of duration. The term may be ascertained from the nature of the purposes expressed, when they are such as to effect a necessary limitation.¹ For "when the purpose for which an express trust is created ceases, the estate of the trustee shall also cease."² And if the purpose of a limitation which effects a suspension must, in its nature, be accomplished during the life of one or of two persons in being, a resulting suspension is sufficiently limited, without more express definition.³ But the death of the trustee or his resignation or removal will not defeat the trust. Nor would his unauthorized conveyance to the beneficiary.⁴ Although, if the testator should validly provide that the trust should be executed by the trustee named by him, or not at all, the term would end with his death, resignation or removal.⁵ The failure of purpose of a proposed trust may occur before the time arrives for the trust to begin.⁶ The stat-

¹ Matter of Smith, 131 N. Y. 239.

² Real Prop. L. § 109; Kip v. Hirsh, 103 N. Y. 565; Nicoll v. Walworth, 4 Den. 385, 388, and cases cited; Watkins v. Reynolds, 123 N. Y. 211; Montgomery v. Merrill, 18 Mich. 338, 343; Stevens v. Earl, 25 Mich. 41; Hopkins v. Kent, 145 N. Y. 363; Benedict v. Dunning, 110 App. Div. 303; Manice v. Manice, 43 N. Y. 303, 363.

³ Locke v. F. L. & T. Co., 140 N. Y. 135, 147; Felter v. Ackerson, 35 App. Div. 282. See Manice v. Manice, 43 N. Y. 303, 363; Crooke v. County of Kings, 97 N. Y. 421, 429.

⁴ Douglas v. Cruger, 80 N. Y. 15, 18.

⁵ For the principle on this particular point, *cf.* Beekman v. Bonsor, 23 N. Y. 298, 303; *et seq.* Hawley v. James, 16 Wend. 61, 140 *et seq.* And this failure of purpose may in some cases be presumed from lapse of time, Kip v. Hirsh, 103 N. Y. 565, and independent of Real Property Law § 110, relating to presumption of termination in general assignments for benefit of creditors.

⁶ Hughes v. Mackin, 16 App. Div. 291.

ute in relation to powers does not now, as it once did,¹ incorporate the foregoing statutory provision that trusts end when their purposes cease, yet the same principle does apply to powers also, in the nature of the case as well as by analogy.²

§ 79. And further, it is not essential, in measuring a term of suspension or postponement, that the two lives should both be specifically identified at the creation of the estate. It may be enough that one is thus made known, and that provision is duly made for the positive ascertainment of the other upon the termination of the first. For example, a will provided, among other things, for a trust during the life of testator's widow, and after her death if a son J survived her, then for a further trust as to half the estate during J's life or until he reached the age of thirty, but if he did not survive her, then during the life of testator's daughter K. Thus during the first designated life, that of the widow, it was uncertain as to one half of the estate, whether the second life would be that of J or K. And this scheme was held valid.³ So it is sufficient to provide that a suspension shall continue during the grantor's life, and after his death then during the life of such one of the "now living" children of B as shall then be the youngest one living.⁴ In such a case there is at no time during the term any uncertainty about the identity of the particular life on which its continuance is then depending. And so also where an open and a

¹ *Harvey v. Brisbin*, 50 Hun, 376, 379, *aff'd* 143 N. Y. 151; *Sweeney v. Warren*, 127 N. Y. 426.

² *Greenland v. Waddell*, 116 N. Y. 234, 246; *Hetzel v. Barber*, 69 N. Y. 1, 12; *Garvey v. McDevitt*, 72 N. Y. 556, 563; *Trask v. Sturges*, 170 N. Y. 482, 489.

³ *Schermerhorn v. Cotting*, 131 N. Y. 48. See also *Van Brunt v. Van Brunt*, 111 N. Y. 178, 184, as to the provision for a wife whom an unmarried man might leave surviving him, as to which compare § 85, *infra*.

⁴ *Van Cott v. Prentice*, 104 N. Y. 45, 56, 57.

sealed paper were delivered to the trustee, one providing for the disposition of the income during the grantor's life, and the other, which was not to be opened until his death, providing for the subsequent disposition. Together they constitute one complete instrument, and it is of no consequence that the provisions are only revealed as they are needed.¹ But if any uncertainty can exist as to whose life it is that is measuring the term at any given time,² the scheme is void, as seen in the cases considered in § 84.

Any Two Lives may be Designated.

§ 80. The persons whose lives are designated as the "two lives in being," need not be beneficiaries of the trust, or otherwise interested in any of the limitations. They may be any persons in being.³ The fact that if the life of a person not a beneficiary is designated to measure the trust term, the beneficiaries may all die before the end of his life, presents no difficulty. The trust in that case is to last during the designated life or less,—that is, will terminate short of the end of the designated life if the objects pass out of existence.⁴

Part of a Life is a "Life."

§ 81. Although the term must be measured by lives, it need not continue throughout two complete lives. It

¹ Van Cott v. Prentice, 104 N. Y. 45.

² Brown v. Evans, 34 Barb. 594; Bean v. Hockman, 31 Barb. 78.

³ Crooke v. County of Kings, 97 N. Y. 421, 435; Bailey v. Bailey, 97 N. Y. 460, 467; Bevins v. Riley, 24 Weekly Digest, 35; Stringer v. Young, 191 N. Y. 157; thus overruling a dictum to the contrary in Downing v. Marshall, 23 N. Y. 366, 377. See also Haxtun v. Corse, 2 Barb. Ch. 506; Butler v. Butler, 3 Barb. Ch. 304; Gilman v. Reddington, 24 N. Y. 9; Manice v. Manice, 43 N. Y. 303, 386; Woodgate v. Fleet, 64 N. Y. 566, 570; Provost v. Provost, 70 N. Y. 141.

⁴ Crooke v. Co. of Kings, 97 N. Y. 421, 435-441; Bailey v. Bailey, 97 N. Y. 460, 466; Thebaud v. Schermerhorn, 30 Hun, 332.

may be shorter than they, although it must not be longer. The statutes permit suspension, or postponement of vesting, during two lives in being, or one life, or any portion thereof. Thus a term of suspension to continue until A reaches the age of 35 or earlier dies;¹ or for the life of A, unless A live beyond a specified date, and in that case to terminate on that date,² is valid. And a suspension for a specified part of a life exhausts the privilege, to the extent of one life, as completely as if an entire life had been named.³

A Minority is a "Life."

§ 82. The minority of a given person may properly be designated as a "life in being" by which a term of suspension is to be measured, or during which the vesting of a remainder is to be postponed. In such a case the designated minority counts as one entire "life," or, as the phrase goes, "a minority is a life."⁴ Accordingly, a suspension for two minorities is equivalent to a suspension for two lives, and when the two minorities have ended, two "lives," in the statutory sense, have also ended, and the suspension must cease. And a suspension during two minorities and the further life of a third person, violates the statute; it is a suspension for three lives.⁵ And so does a suspension for more minorities than two;⁶ but a suspension to continue

¹ *Sawyer v. Cubby*, 146 N. Y. 192.

² See *De Kay v. Irving*, 5 Den. 646, 652; *Matter of Verplanck*, 91 N. Y. 439.

³ Cases cited in the following section, including *Benedict v. Webb*, 98 N. Y. 460, 466.

⁴ *Benedict v. Webb*, 98 N. Y. 460, 466; *Oxley v. Lane*, 35 N. Y. 340; *Savage v. Burnham*, 17 N. Y. 561, 572; *Jacoby v. Jacoby*, 188 N. Y. 124.

⁵ *Benedict v. Webb*, 98 N. Y. 460, 466.

⁶ *Hawley v. James*, 16 Wend. 61; *Matter of Butterfield*, 133 N. Y. 473; *Brown v. Quintard*, 177 N. Y. 75; *Ahearn v. Ahearn*, 52 App. Div. 356; *Levy v. Hart*, 54 Barb. 248. These statements are subject to an exception in the special case covered by Real Prop. L. § 42.

during two minorities, and thereafter during the further life of one of the same persons is valid. For a suspension during the minority of a given individual and a further suspension during the rest of the life of the same person, does not differ in legal effect from a single suspension in the first instance during the life of that person.¹ Where the life or minority of an infant is utilized to represent one of the "two lives" which may be employed as a measure of the term of suspension, it must, like any "life" so employed be that of a person in being at the creation of the estate.² For this purpose, the lives of infants not in being will not answer.³ But an infant after its birth, is to be regarded as having been in being when *en ventre sa mere*.⁴ When a term of suspension is measured by a minority, it is assumed, unless a contrary intent appear,⁵ that the suspension was intended to cease upon the earlier death of the designated person, during his minority, and as so construed, the term is valid.⁶ But if a grantor or testator should attempt to create a suspension to continue during minority or, in case of the earlier ending of the designated life, until the minor would have come

¹ *Benedict v. Webb*, 98 N. Y. 460, 466.

² *Schlereth v. Schlereth*, 173 N. Y. 444. A different rule applies, however, where a suspension or postponement, is to continue for an additional minority in the exceptional case provided for in Real Property Law, § 42. See § 86, *infra*.

³ See *Woodgate v. Fleet*, 64 N. Y. 566, 572; *Schlereth v. Schlereth*, 173 N. Y. 444.

⁴ *Infra*, § 83.

⁵ *Titus v. Weeks*, 37 Barb. 136.

⁶ *Oxley v. Lane*, 35 N. Y. 340, 345; *Butler v. Butler*, 3 Barb. Ch. 304; *Lang v. Ropke*, 5 Sandf. (S. C.) 363, 369; *Jacoby v. Jacoby*, 188 N. Y. 124; *Matter of Lally*, 136 App. Div. 781, aff'd 198 N. Y. 608; *Becker v. Becker*, 13 App. Div. 342; *Stehlin v. Stehlin*, 67 Hun, 110; *Matter of Moloughney*, 67 App. Div. 148. See also *Toher v. Crounse*, 57 Misc. 252; *Matter of Mikantowicz*, 60 Misc. 273. See "at my son John becoming of age," *McGowan v. McGowan*, 2 Duer, 57.

of age if he had lived, the term would not be duly limited.¹

The Period of Gestation.

§ 83. When under the two Rules relating respectively, in the case of real property, to alienability and to vesting, and the Rule relating, in the case of personal property, to absolute ownership, it is of consequence to determine just when a given life begins, the controlling principle is that after birth, a child is deemed to have been already in being while *en ventre sa mere*. This proposition in no way adds to or qualifies the maximum statutory term of two lives in being and in certain exceptional cases a further actual minority. The lives or minorities of persons designated with reference to the measuring of the term, or as beneficiaries, devisees or legatees, are merely regarded as including the additional period before actual birth. It is possible that literally considered there might be certain phases or features included in these sweeping propositions, not strictly settled by the cases. But the principle is well established and often applied, and the tendency is to give it general application within the scope of the Rules.²

¹ Walsh v. Waldron, 63 Hun, 315, aff'd 135 N. Y. 650; Haynes v. Sherman, 117 N. Y. 433; Hagemeyer v. Saulpaugh, 97 App. Div. 535; Ahearn v. Ahearn, 52 App. Div. 536; Field v. Field's Exrs., 4 Sandf. Ch. 563; Boynton v. Hoyt, 1 Den. 53. See Burke v. Valentine, 52 Barb. 412, said in 137 App. Div. 869, to have been affirmed, 6 Alb. L. J. 167. Compare Coston v. Coston, 118 App. Div. 1; Keenan v. Keenan, 122 App. Div. 435. See also Real Prop. L. § 42; *In re Sand's Will*, 3 N. Y. Supp. 67, S. C. 20 State Rep. 850, and *infra*, § 84.

² Cooper v. Heatherington, 65 App. Div. 561; Smith v. Edwards, 88 N. Y. 92, 110; Arnot v. Arnot, 75 App. Div. 230; Marsellis v. Thalhimier, 2 Pai. 35; Jenkins v. Freyer, 4 Pai. 47, 53; Mason v. Mason's Exrs., 2 Sandf. Ch. 432, aff'd 2 Barb. 229; Gott v. Cook, 7 Pai. 521; Schlereth v. Schlereth, 173 N. Y. 444, 449; Thomas, Law of Estates Created by Will, Vol. I, p. 403; Gray, Perpetuities, 2nd Ed., § 220-222; Fowler, Real Property Law, 3rd Ed., p. 269, note 85; Reeves, Real Property, Vol.

Life of "Eldest" or "Youngest" Surviving Child.

§ 84. A provision that a term shall continue until the majority, or until some other specified age, of the "eldest surviving child," or of the "youngest surviving child," is evidently ambiguous.¹ The word "surviving" might mean "surviving at the creation of the estate," or it might mean "surviving to reach majority" or other specified age, or surviving at some future time though not in being at the creation of the estate. The former meaning, being specific, and pointing out an individual living and ascertainable when the term of suspension begins, renders the designation valid, for in no event could the term extend beyond the majority or earlier death of a certain person capable of identification immediately upon the creation of the estate.² If, however, in any given case, the phrase under discussion means "the eldest (or youngest) child who survives to reach majority," or any other specified age, it necessarily defers to a future time the determination as to who will be the eldest, or the youngest, to attain that age; and if the life of the survivor is employed as one of the two "lives" to measure the term, and there are more than two persons in the class designated or if the meaning is such that the survivor

II, § 960. Posthumous children, Real Prop. L., § 56; Decedent Estate Law, § 93.

¹ *Matteson v. Palser*, 173 N. Y. 404, 411-412; *Schlereth v. Schlereth*, 173 N. Y. 444, 451.

² *Jacoby v. Jacoby*, 188 N. Y. 124; *Matter of Lally*, 136 App. Div. 781, 785; *Matter of Dippel*, 71 App. Div. 598; *Matter of Moloughney*, 67 App. Div. 148; *Becker v. Becker*, 13 App. Div. 342; *Van Cott v. Prentice*, 104 N. Y. 45, 56-7; *Burke v. Valentine*, 52 Barb. 412, *aff'd* 6 Alb. Law J. 167; *Stehlin v. Stehlin*, 67 Hun. 110; *Coston v. Coston*, 118 App. Div. 1; *James v. Beasley*, 14 Hun. 520; *In re Sand's Will*, 3 N. Y. Supp. 67, 20 State Rep. 850, and cases cited; *Neaves v. Neaves*, 37 Hun. 438. See *Roe v. Vingut*, 117 N. Y. 204; *Simpson v. Cook*, 24 Minn. 180, 185; *Drake v. Pell*, Edw. Ch. 251; *Eells v. Lynch*, 8 Bosw. 465; *Stewart v. McMartin*, 5 Barb. 438.

might be a person not in being at the creation of the estate, the provision is void.¹ But even if such is the meaning it is necessary, in order to raise any question of invalidity, to show affirmatively that the facts as existing at the creation of the estate were still such that an illegal suspension might result.² And in the absence of an evident intent to the contrary it will be presumed that the intended meaning of the phrase is that which will render it valid.³

Life of "Wife;" "Widow;" "Husband."

§ 85. The necessity of employing lives "in being" to measure the term of suspension is well illustrated in *Schettler v. Smith*,⁴ where a testator created a trust for his son Lawrence for life, and on his death for Lawrence's "widow" for her life. Lawrence was then married, but in view of all the terms of the will, the court held that the testator did not intend, in using the word "widow" to refer exclusively to Lawrence's then living wife, but meant to refer generally to any wife whom Lawrence might have at the time of his death, and who might therefore be a person not in being at

¹ *Jennings v. Jennings*, 7 N. Y. 547; *Hawley v. James*, 16 Wend. 61 120; *Matter of Butterfield*, 133 N. Y. 473; *Schlereth v. Schlereth*, 173 N. Y. 444; *Greenland v. Waddell*, 116 N. Y. 234, 244; *Titus v. Weeks*, 37 Barb. 136; *Brown v. Evans*, 34 Barb. 594; *Bean v. Hockman*, 31 Barb. 78; *Thompson v. Carmichael's Ex'rs*, 1 Sandf. Ch. 387.

² See *infra*, §§ 114, 115.

³ *Jacoby v. Jacoby*, 188 N. Y. 124, 130; *Coston v. Coston*, 118 App. Div. 1; *In re Sand's Will*, 3 N. Y. Supp. 67; *Butler v. Butler*, 3 Barb. Ch. 304, 309; *Matter of Dippel*, 71 App. Div. 598; *Matter of Lally*, 136 App. Div. 781, 787, *aff'd* 198 N. Y. 608; see also *Toher v. Crounse*, 57 Misc. 252; *Matter of Mikantowicz*, 60 Misc. 273; *O'Keeffe v. Westphal*, 139 App. Div. 79.

⁴ 41 N. Y. 328, "3d"; 331, "4th"; 338 *et seq.*; 346 *et seq.* See also on the same point, *Tiers v. Tiers*, 98 N. Y. 568, 573; *Stevens v. Miller*, 2 Dem. 597; *Lee v. Lee*, 2 How. Pr. (N. S.) 76; *Mason v. Jones*, 2 Barb. 229, 247, *aff'd* see 2 N. Y. 327; *Wright v. Mercein*, 34 Misc. 414.

testator's death; and the provision for Lawrence's widow was declared void.¹ And where the same testator made the same provision for his son John, who was then unmarried, the same result would no doubt follow.² But in the same case it was intimated that if a trust were created for the life of A, a married man, and then for the life of "his wife," simply, the phraseology would be understood to designate A's then living wife only, and to create a valid measure for the term.³ In such a case, where there were seven children who were married and one who was unmarried,⁴ the court say "We do not think the construction should be changed when we come to the case of the unmarried son, for, though the trust was divisible, it was created at once for all the children, and by a common description and expression."⁵ It is to be noticed that if a provision for the "widow" of the beneficiary of an express trust constitutes not a trust for her benefit, but an absolute gift to take effect in possession upon the husband's death, it is no objection to its validity that she might be a person not in being at the creation of the estate.⁶

The Additional Term of Minority.

§ 86. Section 42 of the Real Property Law, after defining suspension of the absolute power of alienation, and declaring void such future estates as shall suspend

¹ See *Meeker v. Draffen*, 201 N. Y. 205.

² *Schettler v. Smith*, 41 N. Y. at 330, "2nd"; 331 "3d"; 335 *et seq.* See *Stevens v. Miller*, 2 Dem. 597.

³ *Schettler v. Smith*, 41 N. Y. 328, 338; *Van Brunt v. Van Brunt*, 111 N. Y. 178, 184; *Meeker v. Draffen*, 201 N. Y. 205. See also *Davis v. Kerr*, 30 App. Div. 322; *Allen v. Allen*, 149 N. Y. 280; *Gray, Perpetuities*, 2nd Ed., § 214; *Marsden, Perpetuities*, 103, 175.

⁴ *Van Brunt v. Van Brunt*, 111 N. Y. 178.

⁵ Compare *Schermerhorn v. Cotting*, 131 N. Y. 48; *Van Cott v. Prentice*, 104 N. Y. 45, 56, 57.

⁶ *Durfee v. Pomeroy*, 154 N. Y. 583.

such absolute power for more than two lives in being, adds, by way of exception, "that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority."¹ This statute refers, in the plural, to the "persons" to whom the first remainder is limited, and to the determination of the estate of "such persons" before "they" attain full age. And the words used by the original Revisers, in their Notes to the section, may possibly suggest that the statutory provision has in some way a wider scope than if it were explicitly confined in terms to the case of one devolution only, of the class specified.²

§ 87. One construction that has been suggested is, that the statute authorizes successive remainders over, in fee, in case of successive terminations of prior remainders during minority; or successive cross remainders over among the members of a class, in case of the termination of individual shares during minority, with a possible ultimate remainder over in case all the original shares are thus terminated. Another is, that it authorizes alternative ultimate remainders in fee, one

¹ Real Property Law, § 61, relating to express trusts for the accumulation of rents and profits, also bears upon the subject of the additional term of minority. § 211. As to express trusts for the application of rents and profits, see § 222.

² See for example the remarks in *Forsyth v. Rathbone*, 34 Barb. 388, of the court below, given *id.* p. 404; *Vail v. Vail*, 7 Barb. 226, and 4 Pai. 317, and see *Fowler*, Real Property Law, 3rd Ed., pp. 305-309, for a valuable discussion of this subject.

or the other to vest, according to the contingency, in case of the failure of the prior remainder during minority. Another suggests the view that only one ultimate remainder can be provided for in any event. On these questions, in addition to the terms of the statute, and the form of the Revisers' Notes already mentioned, the following points are to be noticed.

§ 88. So far as concerns provision for mere alternative ultimate remainders, one or the other of which must vest, if at all, at the majority, or earlier death, of the first taker in fee, the case appears to be fully covered by § 51 of the Real Property Law, and is in no way in opposition to either Rule I, relating to alienability, or Rule II, relating to vesting, for whichever remainder takes effect, alienability and vesting must both exist by the end of the period clearly authorized by statute.¹ As to a series of remainders in fee, vesting during minority and successively subject to divesting, on like contingencies, it appears that if this were allowable, then either the possible term of suspension might validly be made perpetual, which seems wholly inconsistent with every feature of the statutory scheme; or continuous at least during the minority of all the infants in being, which is equally inconsistent; or else, the period for possible successive devolutions must be measured by what would have been the minority of the first infant remainderman in the series, if he had lived to come of age, a view which is apparently opposed to the theory and probable intent of the statute quoted.²

§ 89. During all the period since the enactment of the Revised Statutes, it seems to have been uniformly

¹ Fowler v. Depau, 26 Barb. 224.

² Jacoby v. Jacoby, 188 N. Y. 124, 130.

regarded by the courts¹ as settled, that the period extending through two lives and until the majority or earlier death of one infant, furnished, when understood as including allowance for periods of gestation, the extreme maximum of the authorized term.² And § 50 of the Real Property Law provides for limiting a fee or other less estate on a fee, on a contingency which, if it should occur, must happen "within the period prescribed" in the same article; as to which, it may be said that unless the reference is to two lives and in certain cases during one actual minority or until earlier death of the minor, it would be difficult to speak of it as a "prescribed period."

§ 90. And the statute in question itself speaks of the remainder, upon the termination of which a fee may be limited over, as the "first" remainder. This fact was noticed in *Temple v. Hawley*,³ where it was held that a clause directing a further and second contingent limitation over, of a given interest, on the death under age of one who was himself to take on the death of a previous infant remainderman, was invalid, and the Assistant Vice Chancellor says, that the statute in question "requires the contingent remainders thereby authorized, *to take effect* in the event that the persons to whom the *first remainder* is limited, shall die under age of twenty-one years, etc.," and that "it does not permit the creation of a contingent remainder to take effect upon the death of the one who takes under the prior contingency, from the person to whom the first remainder is limited." To the same effect is *Lalor*, Real Property (1855), 87. The use of the plural, in

¹ Except, apparently, in *Adams v. Berger*, 18 N. Y. Supp. 33.

² *Manice v. Manice*, 43 N. Y. 303, 375; *Matter of Bruchaeser*, 49 Misc. 194; *Jennings v. Jennings*, 7 N. Y. 547; *Temple v. Hawley*, 1 Sandf. Ch. 153, 177; *Butler v. Butler*, 3 Barb. Ch. 304, 311.

³ 1 Sandf. Ch. 153, 177.

the statute quoted, is no doubt to be understood as referring to the fact that the remainder may be limited to tenants in common, in shares, each share to be judged on its own merits.¹ It would seem quite clear, therefore, that in the exceptional case provided for, the suspension, or postponement of vesting, can in no event extend, in addition to two designated lives, beyond the majority, or earlier death, of one infant. By the end of two designated lives, and the majority or earlier death of the infant, the suspension and the postponement of vesting must cease.²

§ 91. The terms of a given disposition may be such as to apply only to a minor, or an ultimate remainderman, in being at the creation of the estate, and there is special recognition of one such class of cases in the statute relating to accumulations. But except as thus provided for by the terms or nature of a given disposition, it is not essential that either the infant remainderman, or the ultimate remainderman, should be a person in being at the creation of the estate. It is sufficient if the infant is in being at or prior to the expiration of two designated lives in being; and sufficient if the ultimate remainderman is in being when the estate of the infant ceases, during minority.³

§ 92. Two cases sometimes referred to in connection with this subject, should be briefly considered. In *Post v. Hover*,⁴ land was devised in fee to three in-

¹ *Infra*, § 104, and *Post v. Hover*, 33 N. Y. 593. Compare *Hawley v. James*, 16 Wend. 61, 123-4.

² *Manice v. Manice*, 43 N. Y. 303, 375; *Radley v. Kuhn*, 97 N. Y. 26, 35; *Matter of Howland*, 75 App. Div. 207, 211; *Woodgate v. Fleet*, 64 N. Y. 566, 572-3; *Greenland v. Waddell*, 116 N. Y. 234, 245; *Schlereth v. Schlereth*, 173 N. Y. 444, 454; *Morton v. Morton*, 8 Barb. 18; *Monypeny v. Monypeny*, 131 App. Div. 269; 136 App. Div. 677; 202 N. Y. 90.

³ *Manice v. Manice*, 43 N. Y. 303, 374.

⁴ 33 N. Y. 593.

fants, A, B and C, as tenants in common, subject as to each share, in case of the death of the respective infant during minority, without issue, to devolution over upon a like qualified fee, to the survivors or survivor, and in case of the death of all during minority, without issue, then over in fee to D. Assuming all the infants to die under age, without issue, and taking for consideration the share of A, as the first to die, it will be seen that on his death his share would pass in equal sub-shares to B and C; and that at the death of B, the second to die, his sub-share (as well as his own full share) would pass to C, subject to possible like defeat in favor of D. Now there was no trust, and all possible takers were in being. Accordingly there was no suspension of alienability under Rule I. D's remainder, however, could not vest, if ever, until the death of three persons, thus raising the question of compliance with Rule II (Chapter VI). But the lives of the two first to die would be "two lives in being," and that of the third would be a further minority. The court do not consider the standing of D's remainder, but the question of its validity would seem to depend on the applicability of the statute in question.¹

§ 93. In *Beardsley v. Hotchkiss*,² there was a grant in trust for one life, followed by a devise, in execution of a reserved power, by which the property was given in equal shares to five infants, subject to devolution, if either died during minority without issue, to the survivors, but after the life estate there was no suspension of the power of alienation, because the only uncertainty was as to which of the five infants, all in being, would become absolutely vested at last, and so by

¹ See *Mott v. Ackerman*, 92 N. Y. 539, 549; *Matter of Howland*, 75 App. Div. 207, 210; *Everitt v. Everitt*, 29 N. Y. 39; *Matter of Conger*, 81 App. Div. 493, 500-504.

² 96 N. Y. 201.

uniting they could have conveyed an absolute fee.¹ Each share, however, still continued contingent, but only for one further life as to each. "Upon the death of any child without living issue, the share of such child was given absolutely to the survivors, and vested absolutely in them, free from any other contingencies. Such is the plain language of the will."² Thus the case, though sometimes cited in connection with the subject of additional suspension or postponement after two lives, has no bearing on it. As to any given share, the maximum possible suspension was one life, and the maximum possible postponement of absolute vesting two lives, from the delivery of the original grant.

The Statutory Requirement is Imperative.

§ 94. To be valid, the term of a suspension of the power of alienation must be so limited that in every possible contingency it must end within the period prescribed by the statute. It is not enough that the suspension may terminate by the end of two lives. The instrument must be drawn so that the suspension inevitably must so terminate.³

§ 95. The validity of a scheme involving suspension of the power of alienation depends not at all upon what

¹ Id. p. 214-215.

² Id. p. 213.

³ *Matter of Mount*, 185 N. Y. 162, 169; *Matter of Wilcox*, 194 N. Y. 288, 295; *Schettler v. Smith*, 41 N. Y. 328, 334; 352; *Herzog v. Title Guaranty and Trust Co.*, 177 N. Y. 86; *Simpson v. Trust Co. of America*, 129 App. Div. 200, *aff'd* 197 N. Y. 586; *Henderson v. Henderson*, 113 N. Y. 1, 14, 15; *Knox v. Jones*, 47 N. Y. 389, 397; *Brown v. Evans*, 34 Barb. 594; *Gott v. Cook*, 7 Pai. 521; *Haynes v. Sherman*, 117 N. Y. 433, 437; *Thompson v. Carmichael's Ex'rs*, 1 Sandf. Ch. 387; *Matter of Russell*, 5 Dem. 388; *Broughton v. Jones*, 1 Colby Ch. R. 26; *Hawley v. James*, 16 Wend. 61, 120, 178; *Craig v. Hone*, 2 Edw. Ch. 554, 561; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *McSorley v. Wilson*, 4 Sandf. Ch. 515; *Tayloe v. Gould*, 10 Barb. 388; *Hannan v. Osborn*, 4 Pai. 336, 342; *Knox v. Jones*, 47 N. Y. 389, 397; *DeBarante v. Gott*, 6 Barb. 492, 502.

does in fact happen, subsequent to the date when the instrument takes effect. It depends, on the contrary, entirely on what might happen under the provisions of the instrument viewed from the date when it took effect, to extend the suspension beyond the statutory period.¹ The rule on this point is sometimes stated thus: Where by the terms of the instrument creating an estate, speaking as of the date when it takes effect, there might be an unlawful suspension of the power of alienation, the limitation which might effect that result is void, although it turns out by a subsequent event, as by the falling in of a life, that no actual suspension beyond the statutory period, has taken place. But it always is to be borne in mind that the suspension to which these propositions relate, is a suspension of the absolute power to alienate, and not a mere failure, or chance that there may be a failure, to actually alienate in fact.²

Subordinate Measures of the "Period," When Permitted.

§ 96. Although a term of suspension must, to be valid, be measured by a life or two lives in being and, in the exceptional case provided for in Real Property Law § 42, a further minority, yet there is no objection to also employing some other measure, as for example a term of years, if it cannot extend the period beyond the designated lives.³ And so, even though the instru-

¹ *Matter of Wilcox*, 194 N. Y. 288, 295; *Simpson v. Trust Co. of America*, 129 App. Div. 200, aff'd 197 N. Y. 586; see also cases cited in following sections, and in Chapter X.

² See for the bearing of this principle on (a) a power so framed in general terms that the grantee might, without departing from its mere form, attempt an illegal exercise of it, § 278; (b) cases where the vice affects only an unidentified share, Chapter X; (c) cases of separate future dispositions, one valid and the other void, Chapter X. Also the following sections.

³ *Montignani v. Blade*, 145 N. Y. 111; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Kernochan v. Marshall*, 165 N. Y. 472; *Meldon v. Devlin*, 31 App. Div. 146, and 167 N. Y. 573; *Levy v. Hart*, 54 Barb. 248; *Kahn v.*

ment does adopt some measure of the term other than "two lives in being" such as may be found illustrated in § 75, yet any such measure is unobjectionable, if only there is also a controlling provision that in any event the trust must terminate within one or two designated lives. A trust to continue during the "joint lives" of three persons, is valid, when the term "joint" implies that it is only to last while all three are living, as it must terminate upon the death of that one of the three who dies first.¹ Where a trust is created to continue through the lives of A and B, their death brings the term to an end. And this term need not be for the whole of two lives. It may be expressly provided that the term is to continue until the happening of some collateral contingency which must happen within the statutory period, if ever.² And the grantor may reserve the power to revoke the trust.³ Or he may provide for its termination in case of any "interference" by the beneficiary with the trust provisions;⁴ or at the discretion of the trustee on the happening of certain

Tierney, 135 App. Div. 897, affirmed 201 N. Y. 516; DeKay v. Irving, 5 Den. 646, 653; Hunter v. Hunter, 17 Barb. 25, 90; Phelps' Executor v. Pond, 23 N. Y. 69; Oxley v. Lane, 35 N. Y. 340, 345, 357; Provost v. Provost, 70 N. Y. 141; McCosker v. Brady, 1 Barb. Ch. 329, 342; Keenan v. Keenan, 122 App. Div. 435; DePeyster v. Beekman, 55 How. Pr. 90; Simpson v. Cook, 24 Minn. 180, 184-5; Franklin v. Minertzhagen, 39 App. Div. 555; Thall v. Dreyfus, 84 App. Div. 569. See also Orange County Trust Co. v. Morrison, 56 Misc. 88; Nester v. Nester, 68 Misc. 207; Dexter v. Watson, 54 Misc. 484; Clark v. Goodridge, 51 Misc. 140; Matter of Perry, 48 Misc. 285; Liebmann v. Liebmann, 53 Misc. 488; Kirk v. Kirk, 12 N. Y. Supp. 326; 137 N. Y. 510; Wright v. Mayer, 47 App. Div. 604.

¹ Meldon v. Devlin, 31 App. Div. 146; 167 N. Y. 573.

² Van Cott v. Prentice, 104 N. Y. 45, 52; Montignani v. Blade, 145 N. Y. 111; Crooke v. County of Kings, 97 N. Y. 421.

³ Van Cott v. Prentice, 104 N. Y. 45, 52, 54-5 (cf. Garnsey v. Mundy, 24 N. J. Eq. 243; Conkling v. Davies, 14 Abb. N. C. 499); Rosenberg v. Rosenberg, 40 Hun, 91, where the property was personal; see Matter of Vanderbilt, 20 Hun, 520.

⁴ Van Cott v. Prentice, 104 N. Y. 45, 52; see Woodward v. James, 44 Hun, 95; 115 N. Y. 346.

contingencies.¹ And failure of an essential feature of an entire trust scheme destroys the whole.²

§ 97. And a suspension may be validly created which may perhaps continue through more than two designated lives, if only it be provided that it must in any event cease at the end of two specified lives. Such a provision is discussed at length, although not in issue, in *Bailey v. Bailey*.³ In that case the testator created a trust for a number of relatives, the term to be measured by the lives of two strangers, Thomas and Webster. He also gave to his wife a life interest in a house not covered by the trust, and provided that upon her death it should become a part of the property held in trust, and be disposed of in the same way. Here no suspension was possible beyond the two lives of Thomas and Webster. For if at the end of their lives the widow were already dead, the entire property, including the house, would at their death, be released from the suspension. And if, on the other hand, at the end of their lives, the widow were still living, then (as it would be thenceforth impossible that the house should ever be diverted into the general trust fund), the remainder would vest absolutely in the remaindermen, and they and the widow would among them hold the entire fee with power to convey absolutely.⁴

¹ *Marvin v. Smith*, 56 Barb. 600, 605, aff'd 46 N. Y. 571 (cf. provisions of will in *Matter of City of Rochester*, 110 N. Y. 159, 160).

² Chapter X.

³ 97 N. Y. 460.

⁴ Also *Corse v. Chapman*, 153 N. Y. 466, 473; *Bird v. Pickford*, 141 N. Y. 18; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Montignani v. Blade*, 145 N. Y. 111; *Kernochan v. Marshall*, 165 N. Y. 472; *Frazer v. Hoguet*, 65 App. Div. 192; *Matter of Hurlbut*, 51 Misc. 263; *Kessler v. Friede*, 29 Misc. 187; *Finch v. Wilkes*, 17 Misc. 428; *Emmons v. Cairns*, 3 Barb. 243; see also *Levi v. Scheel*, 124 App. Div. 613. *City of Brooklyn v. Seaman*, 30 Misc. 507, is *contra*, and erroneous. And so, in so far as concerns this point, is *Moore v. Moore*, 47 Barb. 257, which is incorrectly

§ 98. But in another case, *Phelps' Executor v. Pond*,¹ where the provisions were in many respects very similar to those in *Bailey v. Bailey*,² the application of the same principles necessarily led to a decision that the term was invalid. In that case, two trusts were created. The term of one, which we will speak of as the "first" term, was measured by two designated lives, A and B, or the earlier lapse of ten years. The term of the other, which may be spoken of as the "second" term, was measured by the life of C, the beneficiary, and if she died during the continuance of the "first" term, her fund was to fall into the first trust fund and continue suspended throughout the first term. But if C died after the end of the first term, the trust for her was to continue, and upon her death the fund was to be at once distributed. It will be noticed that the "second" term is not measured solely by C's life, for after C's death it is still to run on till the death of A and B or the earlier lapse of ten years. Nor is it measured solely by the life of A and B or the earlier lapse of ten years, for after the end of that term, it is still to run on through the life of C, if still living. In the Phelps case, therefore, the suspension, for lack of being certainly bounded by two lives, was held void.³

§ 99. And here should be mentioned, for the purpose of stating one of the things it does *not* cover or refer to, the principle elsewhere discussed, that a scheme of disposition is invalid under Rule I, Alienability, if a resulting suspension of the power of alienation *may*

said, in 6 Alb. L. J. 257, to have been affirmed; for the three year term there mentioned, would necessarily have ended with the earlier death of a designated person.

¹ 23 N. Y. 69, 79.

² 97 N. Y. 460.

³ Also *Walsh v. Waldron*, 63 Hun, 315, aff'd 135 N. Y. 650; *Brown v. Quintard*, 177 N. Y. 75; *Finch v. Wilkes*, 17 Misc. 428.

possibly continue beyond two lives in being. It is sometimes referred to as if the mere fact that a fixed period of time might elapse, or more than two persons might die, during the term in question, necessarily renders it invalid. Thus (without criticising the net result) in so recent a case as *Matter of Phillips*,¹ the remarks of the court will serve to illustrate the point now under consideration; and so with *City of Brooklyn v. Seaman*,² and *Moore v. Moore*,³ above referred to. As shown by the large number of authoritative cases cited above, such a statement of the law cannot be supported. If it were true, very few trusts, if any, of the classes which occasion suspension, could stand; for in any trust term duly measured by lives, it is always true that a fixed space of time, say of five years, may expire, or that more lives than two may end, before the term of suspension runs out. But in fact such a possibility is immaterial if there are two lives in being beyond which, in any event, the suspension cannot extend.⁴

Alternative "Lives," When Permitted.

§ 100. And not only does the fact that a term is strictly measured by two lives, allow the creator of the suspension to employ, within the limit of those lives, any other subordinate measure whatever, but it also

¹ 56 Misc. 96.

² 30 Misc. 507.

³ 47 Barb. 257.

⁴ As a matter of construction of a given instrument, it has been held, where the term was created to continue until the end of a specified space of time *or* until the death of two designated persons, that the intent was as if the instrument had proceeded to say "whichever of said events shall *first* occur." and thus construed, the scheme was valid. *Clark v. Goodridge*. 51 Misc. 140. And a trust to pay income to A "until the age of fifty (in 1904)," may mean that the date, 1904, is merely added to show when the trust will end if A lives so long, and not to mean that it must last till 1904 even if he dies earlier. *Olcott v. Ossowski*, 34 Misc. 376.

allows him to provide within those same limits for alternative schemes of measurement.¹

Successive Suspensions under Independent Instruments.

§ 101. The fact that an owner of property must confine the period of suspension effected by a grant or devise, within the limits of the "statutory period," does not impair the right of the owner of a remainder there created, or of a reversion there reserved, to subject his remainder or reversion to a separate suspension for a different or additional "statutory period." Thus if the original owner creates an express trust which suspends the power of alienation for two lives in being, retaining the reversion, he may subsequently, and as a separate transaction, dispose of the reversion upon a like express trust for two other lives in being.² And so the owner of a remainder limited on a trust for two lives, may grant or devise that remainder, in trust, for two other lives in being.³ But if the second limitation is created merely by the exercise of a power of appointment derived from the first instrument, then the maximum term of suspension under the two instruments taken together cannot exceed one "statutory period" computed from the going into effect of the first.⁴

¹Matter of Hart, 61 App. Div. 587, aff'd 168 N. Y. 640; Matter of Durand, 194 N. Y. 477, 485; Genet v. Hunt, 113 N. Y. 158; Schermerhorn v. Cotting, 131 N. Y. 48; Van Cott v. Prentice, 104 N. Y. 45, 56, 57. Alternatives, one valid and one void. Schettler v. Smith, 41 N. Y. 328, 335, *et seq.*; Matter of Wilcox, 194 N. Y. 288. Chapter X.

²N. Y. Life Ins. & Trust Co. v. Cary, 191 N. Y. 33; Genet v. Hunt, 113 N. Y. 158, 168; Farmers' Loan & Trust Co. v. Bostwick, 190 N. Y. 569, reversing 120 App. Div. 271.

³Livingston v. N. Y. Life Ins. & Trust Co., 13 N. Y. Supp. 105, 36 N. Y. State Rep. 566, aff'd as McCurdy v. N. Y. L. I. & T. Co., 151 N. Y. 667. See U. S. Trust Co. v. Chauncey, 32 Misc. 358.

⁴Genet v. Hunt, 113 N. Y. 158, 170; *infra* § 294; Farmers' Loan & Trust Co. v. Kip, 192 N. Y. 266; Matter of Dows, 167 N. Y. 227, 231.

Separate "Statutory Periods" for Separate Shares.

§ 102. Although the owner of property cannot suspend the alienability of any part of it beyond the statutory period of two lives in being and in certain cases a further minority, yet he is at liberty to dispose of separate parcels, shares, or interests, and to subject each to its own separate statutory period of suspension. For no particular parcel or share is thus tied up for more than its respective lawful term. This proposition applies not only to cases where the legal title to each parcel or share is separately disposed of, but also to cases where the legal title to all the property in question is vested in the same trustee, and the beneficial interests thus provided for are separate and distinct, each being subjected to its own independent term of suspension;¹ and not only to a primary division into principal shares, but also to a division, to be effected later, into sub-shares.² Such a division and sub-division of beneficial interests is illustrated in the following diagram, showing nine main shares, and the division of two of

¹ *Vanderpoel v. Loew*, 112 N. Y. 167, 181; *Wells v. Wells*, 88 N. Y. 323, 324 VI, 333; *Matter of Mount*, 185 N. Y. 162; *Monson v. N. Y. S. & T. Co.*, 140 N. Y. 498; *Corse v. Chapman*, 153 N. Y. 466; *Savage v. Burnham*, 17 N. Y. 561; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Palms v. Palms*, 68 Mich. 355; *Hardenbergh v. McCarthy*, 130 App. Div. 538; *Everitt v. Everitt*, 29 N. Y. 39; *Bingham v. Jones*, 25 Hun, 6; *Phillips v. Davies*, 92 N. Y. 199; *Bruner v. Meigs*, 64 N. Y. 506; *Mullarky v. Sullivan*, 136 N. Y. 227, 229; *Trolan v. Rogers*, 79 Hun, 507; *Thorn v. Coles*, 3 Edw. Ch. 330, 333-4. See also *Nichols v. Nichols*, 42 Misc. 381; *McGregor v. McGregor*, 22 N. Y. Week. Dig. 305; *Matter of Hoffman*, 140 App. Div. 122, aff'd 201 N. Y. 247; *Pryer v. Pryer*, 126 N. Y. Supp. 393; *Fisher v. Langlotz*, 100 N. Y. Supp. 578; *Bascom v. Weed*, 53 Misc. 496; *Matter of Benzel*, 70 Misc. 279, in which latter case, however (irrespective of the merits of the construction given to the language there in question), the citation of *Ward v. Ward*, 23 Weekly Dig. 466, in support thereof appears to be erroneous, for see *Ward v. Ward*, 105 N. Y. 68.

² *Monson v. N. Y. S. & T. Co.*, 140 N. Y. 498; *Moore v. Hegeman*, 72 N. Y. 376, as to which see *Pray v. Hegeman*, 92 N. Y. 508 and 98 N. Y. 351; see also *Matter of Buchner*, 60 Misc. 287.

them into three sub-shares each, and one of them into four sub-shares.

§ 103. From this it appears that the share consisting of 3-14, and held in trust for A for his life, is at his death to be subdivided into three sub-shares to be held in trust each for the life of a separate person. These sub-shares consist respectively of 3-28, 3-56 and 3-56. The original interests of D and of G, are also on their respective deaths to be subdivided in the same manner. Taking the sub-share of 3-28, as an instance, we see that is inalienable first during the life of A. Then it is further held in trust during the life of one other person. That makes up two lives. Then it is freed from the trusts and vests. The same is true of each of the other sub-shares. The further fact that A, for example, and the three beneficiaries of the corresponding three sub-shares, might all die before any of the other beneficiaries, and that thus all the rest of the property, namely 11-14, might remain inalienable during the lives of those four persons, is immaterial, because their lives were not designated as measures of the terms applicable to the 11-14 or any part thereof. Each of the six shares not subdivided, could only be inalienable during the one designated life by which its term was measured, and each of the ten sub-shares could only be inalienable during the one original and one secondary life by which its term was measured.

§ 104. As each share exhausts the two lives designated to measure it, it must immediately, if the scheme is valid,

become freed from the suspension, and vest beneficially somewhere. For if an attempt should be made to have a share held in trust for one life, and then divided into parts each to be held in trust for a separate second life, and then each sub-share to be still further held in trust after the expiration of its second life, for a still further term, the scheme would run counter to the statute.¹

§ 105. To describe cases where each share has its own independent period of duration, the term "tenancy in common" is often employed, by way of analogy. But if there is only one period for all the shares, and the interests of those who die continue for those who survive, the relationship is described as "joint tenancy." In either case the scheme must, to be valid, satisfy the same test as to duration; but evidently a disposition invalid if constituting one "joint tenancy," might often be valid if found to involve separate shares with independent terms. In such cases, the pivotal question is the inquiry whether the intention was to create one term of suspension, enveloping all the interests, and holding them in its grasp throughout the entire period; or whether the intention was to constitute distinct and separate interests, each to be measured by its own term and having its own separate course to pursue.²

§ 106. If in any case where this distinction between joint tenancy and tenancy in common, as among the beneficiaries of an express trust, would thus be controlling on the question of undue suspension, and the intent of the creator of the trust, either one way or the other, is sufficiently shown, the courts hold the trust, as he chose to make it, valid, because calling for separate

¹ Except in the single case where a trust may continue for a minority after two lives, *Manice v. Manice*, 43 N. Y. 303, 375, *et seq.*

² *Finch, J., in Vanderpoel v. Loew*, 112 N. Y. 167, 177.

shares, each affected by a separate valid term;¹ or void, because calling for one estate or fund affected by a single illegal term.² And this is true whether the trust is one of real property,³ or of personal property.⁴

§ 107. In order to be valid under the principles just stated, the trusts need not be separately framed; if the interests of the beneficiaries are given in shares, the separable and distinct character of the trust provisions necessarily results.⁵ All that is requisite is that the

¹ *Stevenson v. Lesley*, 70 N. Y. 512; *Savage v. Burnham*, 17 N. Y. 561, 570; *Bulkley v. DePeyster*, 26 Wend. 21; *Bingham v. Jones*, 25 Hun, 6; *Mason v. Jones*, 2 Barb. 229, 242; *Everitt v. Everitt*, 29 N. Y. 39, 82; *Shipman v. Rollins*, 98 N. Y. 311, 314, 330; *Corse v. Corse*, 144 N. Y. 569; *Maitland v. Baldwin*, 70 Hun, 267; *Foote v. Bruggerhof*, 66 Hun, 406; *Matter of Truslow*, 140 N. Y. 599; *Denison v. Denison*, 185 N. Y. 438; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Matthews v. Studley*, 17 App. Div. 303, aff'd 161 N. Y. 633; *Corse v. Chapman*, 153 N. Y. 466; *Matter of Charlier*, 22 App. Div. 71; *Matter of Tompkins*, 154 N. Y. 634; *Matter of Brown*, 154 N. Y. 313; *McLouth v. Hunt*, 154 N. Y. 179; *Durfee v. Pomeroy*, 154 N. Y. 583; *Campbell v. Stokes*, 142 N. Y. 23; *Allen v. Allen*, 149 N. Y. 280; *Leach v. Godwin*, 198 N. Y. 35; *Wells v. Wells*, 88 N. Y. 323; *Post v. Bruere*, 127 App. Div. 250.

² *Knox v. Jones*, 47 N. Y. 389; *Ward v. Ward*, 105 N. Y. 68; *Colton v. Fox*, 6 Hun, 49, and 67 N. Y. 348; *Hone v. Van Schaick*, 20 Wend. 564; *Van Nostrand v. Moore*, 52 N. Y. 12, 22, *et seq.* (consult also dissenting opinion of Wright, J., in *Everitt v. Everitt*, 29 N. Y. 39, 97; *Thorn v. Coles*, 3 Edw. Ch. 330); *Central Trust Co. v. Egleston*, 185 N. Y. 23, 29-34; *Matter of Trotter*, 104 App. Div. 188, aff'd 182 N. Y. 465; *Walsh v. Waldron*, 63 Hun, 315, aff'd 135 N. Y. 650; *Fowler v. Ingersoll*, 127 N. Y. 472; *Brown v. Richter*, 76 Hun, 469, aff'd 144 N. Y. 706; *Brown v. Quintard*, 177 N. Y. 75, 82. See also *Mendel v. Levis*, 40 Misc. 271.

³ *Ward v. Ward*, 105 N. Y. 68; *Colton v. Fox*, 6 Hun, 49, and 67 N. Y. 348; *Stevenson v. Lesley*, 70 N. Y. 512.

⁴ *Knox v. Jones*, 47 N. Y. 389; *Matter of Lapham*, 37 N. Y. 15; *Everitt v. Everitt*, 29 N. Y. 39, 71; *Savage v. Burnham*, 17 N. Y. 561, 570; *Bulkley v. DePeyster*, 26 Wend. 21.

⁵ *Stevenson v. Lesley*, 70 N. Y. 512, 516; *Van Brunt v. Van Brunt*, 111 N. Y. 178; and see *Bingham v. Jones*, 25 Hun, 6; *Bevan v. Cooper*, 72 N. Y. 317, 319; *Matter of Verplank*, 91 N. Y. 439, 443; *Wells v. Wells*, 88 N. Y. 323, 333; *Savage v. Burnham*, 17 N. Y. 561, 570, *et seq.*; *Mason v. Mason's Ex'rs.* 2 Sandf. Ch. 432; *Dickie v. Van Vleck*, 5 Redf. 284; *Hunter v. Hunter*, 31 Barb. 334, 338, and other cases above cited.

intent to have the estate contemplated as theoretically divided into separate parcels or portions, should appear. Even this much need not be explicitly expressed.¹ Indeed, a provision that the entire property shall remain actually undivided until final distribution, except as portions from time to time should drop out of the general estate and vest, is not inconsistent with a separation of the interests of the beneficiaries, in contemplation.²

§ 108. And on the other hand, the mere fact that the trust scheme is found in a direction to pay different portions of income to different beneficiaries for different periods, does not necessarily render it valid, for the intent may nevertheless be to have only one indivisible trust, rendering all the property inalienable during a period not duly measured.³

§ 109. Thus far, we have confined ourselves to the distinction between joint tenancy and tenancy in common, either literally or as those terms are employed with reference to beneficial interests under express trusts. But it is now to be further noticed that even if the estates or interests in question are in a given case to be regarded as held in common, or in severalty, a

¹ *Vanderpoel v. Loew*, 112 N. Y. 167, 177; *Matter of Verplank*, 91 N. Y. 439, 443; *Wells v. Wells*, 88 N. Y. 323, 333; *Stevenson v. Lesley*, 70 N. Y. 512; *Savage v. Burnham*, 17 N. Y. 561, 570, *et seq.*; *Surdam v. Cornell*, 116 N. Y. 305; *Locke v. F. L. & T. Co.*, 140 N. Y. 135, 144. See *Colton v. Fox*, 67 N. Y. 348, and *Ward v. Ward*, 105 N. Y. 68, as explained in *Schermerhorn v. Cotting*, 131 N. Y. 48, 61.

² *Vanderpoel v. Loew*, 112 N. Y. 167, 177. And for illustrations of particular provisions and phrases, see also *Van Brunt v. Van Brunt*, 111 N. Y. 178, 183; *Gage v. Gage*, 43 Hun, 501; 112 N. Y. 667; *Everitt v. Everitt*, 29 N. Y. 39, 73, *et seq.*; *Mason v. Mason's Executors*, 2 Sandf. Ch. 432; *Colton v. Fox*, 6 Hun, 49, 67 N. Y. 348; *Van Schuyver v. Mulford*, 59 N. Y. 426, 433; *Leavitt v. Wolcott*, 63 How. Pr. 51, and 95 N. Y. 212; *Smith v. Edwards*, 88 N. Y. 92, 103, and cases cited, *supra*; *Locke v. F. L. & T. Co.*, 140 N. Y. 135, 144.

³ *Matter of Trotter*, 104 App. Div. 188, *aff'd* 182 N. Y. 465.

situation similar to that occasioned by joint tenancy may nevertheless arise out of the existence of so-called cross remainders. For if the expressed purpose is to have each share, upon the death of a beneficiary, successively divided, and subdivided, and resubdivided, and constantly added on to and merged in the remaining shares as long as any of the beneficiaries live, the net result would be the same, in relation to suspension, as if the interests of the beneficiaries were regarded as joint, and if more than two lives are involved, the scheme of suspension, to continue during more than two lives, would be void, in whole or in part, according to the circumstances.¹

§ 110. But even where it is clear that upon the death of a given beneficiary, his share is to be divided, and the sub-shares are to be added to the shares of the surviving beneficiaries and still held in the grasp of the trust, yet in the absence of clear indications of intent it will not be assumed that upon the death of a second beneficiary, the sub-share is to be again subdivided along with his own full share, and held in trust for the still remaining survivors. On the contrary, and in aid of the validity of the scheme, it will be presumed that the direction for subdivision and continuance of the trust applies only to each original share, on the death of its first taker.² As Finch, J., expresses it:³ "The fraction of a share which has been twice immersed in the common fund and each time by an affirmative and specific direction,

¹ *Brown v. Richter*, 76 Hun, 469, *aff'd* 144 N. Y. 706; *Simpson v. Trust Co. of America*, 129 App. Div. 200, *aff'd* 197 N. Y. 586; *Fowler v. Ingersoll*, 127 N. Y. 472; *Duncklee v. Butler*, 38 App. Div. 99; see also *Dana v. Murray*, 122 N. Y. 604, 615.

² *Vanderpoel v. Loew*, 112 N. Y. 167, 183, *et seq.*; *Everitt v. Everitt*, 29 N. Y. 39, 85; *Corse v. Chapman*, 153 N. Y. 466, 473; see also *Oxley v. Lane*, 35 N. Y. 340, 349; *Manice v. Manice*, 43 N. Y. 303.

³ *Vanderpoel v. Loew*, 112 N. Y. 167, 183, *et seq.*

is not to be drowned in it a third time upon presumption, and without explicit command, and to the utter destruction of the entire trust."

§ 111. If, as not infrequently happens, it is not clear whether the grantor or testator intended to create a so-called tenancy in common, or a joint tenancy among beneficiaries, the first resort, in solving the difficulty, is to the statutory presumption in favor of tenancy in common.¹ Although this statute refers to real property, it has gradually² become settled, and is now established law, that by virtue of § 11 of the Personal Property Law it likewise applies to future interests in personal property, and also, by way of analogy, to present interests as well,³ and apparently covers the interests of beneficiaries under express trusts of real and personal property.⁴

§ 112. But however this may be, it is now settled that even apart from the statute, the presumption itself, in favor of tenancy in common, does apply to beneficial interests under such express trusts, where it is called for in order to sustain their validity, because "the court is bound, by that familiar principle which prevails both

¹ Real Property L. § 66. See *Purdy v. Hayt*, 92 N. Y. 446, 453; *Mott v. Ackerman*, 92 N. Y. 539, 549; *Gage v. Gage*, 43 Hun, 501; 112 N. Y. 667; *Campbell v. Rawdon*, 18 N. Y. 412.

² *Putnam v. Putnam*, 4 Bradf. 308; *Blanchard v. Blanchard*, 4 Hun, 287, *aff'd* 70 N. Y. 615; *Lane v. Brown*, 20 Hun, 382; *Van Brunt v. Van Brunt*, 111 N. Y. 178, 187; *Matter of Baker*, 12 State Reporter, 741; *Everitt v. Everitt*, 29 N. Y. 39, 72; *Bliven v. Seymour*, 88 N. Y. 469, 478.

³ *Matter of Kimberly*, 150 N. Y. 90, 93; *Matter of Russell*, 163 N. Y. 169, 175. See § 384, *infra*; and compare *Matter of Kaupper*, 141 App. Div. 54, *aff'd* 201 N. Y. (Mem.).

⁴ Opinion of Walworth, Ch., in *Lorillard v. Coster*, 5 Pai. 172, 228-9; *Nelson, J.*, in *Coster v. Lorillard*, 14 Wend. 265, 335, *et seq.*; *Matter of Lapham*, 37 N. Y. 15; *Everitt v. Everitt*, 29 N. Y. 39; *Matter of Hoffman*, 65 Misc. 126; 140 App. Div. 122; 201 N. Y. 247. Compare opinion of *Savage, Ch. J.*, *Coster v. Lorillard*, 14 Wend. 265, 315-16-17.

at law and in equity, where a deed or will admits of a twofold construction, one of which would render it void, and the other would uphold it, to give it that construction which will leave it effectual in law.”¹

Number of Beneficiaries is not Limited.

§ 113. It is only the term that must be restricted to “two lives in being.” There is no restriction upon the number of persons who may be designated to receive, during that term, the benefits of an express trust.² And a trust may also provide, within the statutory limit, for beneficiaries not ascertained at the creation of the trust, as, for instance, children yet unborn,³ or the issue that may be left by a designated beneficiary, in case of his death during the term.⁴ And on the same principle, the use may be shifted from one beneficiary to another during the legal term, the only requirement being that the beneficiaries must become ascertained during the trust

¹ *Mason v. Jones*, 2 Barb. 229, 242; *Cromwell v. Cromwell*, 2 Edw. Ch. 495, aff'd 3 Chan. Sentinel 7; *Harrison v. Harrison*, 36 N. Y. 543; *Matter of Verplanck*, 91 N. Y. 439; *Hillyer v. Vandewater*, 24 N. E. Rep. 999, and (without opinion) 121 N. Y. 681; *Vanderpoel v. Loew*, 112 N. Y. 167, 177; *Locke v. F. L. & T. Co.*, 140 N. Y. 135, 143-5; *Butler v. Butler*, 3 Barb. Ch. 304, 309. For cases where on termination of the trust in a given share, an ultimate legatee or devisee becomes a tenant in common with the trustee, see *Levi v. Scheel*, 124 App. Div. 613; *Matter of Viele*, 35 App. Div. 211; *Steinway v. Steinway*, 163 N. Y. 183; *Sabbaton v. Sabbaton*, 76 App. Div. 216; *Corse v. Corse*, 144 N. Y. 569; *Durfee v. Pomeroy*, 154 N. Y. 583; *Cussack v. Tweedy*, 126 N. Y. 81, 88; *Duclos v. Benner*, 136 N. Y. 560; *Matter of Brown*, 154 N. Y. 313; *Goebel v. Wolf*, 113 N. Y. 405; *Delafeld v. Shipman*, 103 N. Y. 463.

² *Crooke v. County of Kings*, 97 N. Y. 421, 440; *Bailey v. Bailey*, 97 N. Y. 466; *Shepard v. Gassner*, 41 Hun, 326; *Fenton v. Fenton*, 35 Misc. 479.

³ *Woodgate v. Fleet*, 64 N. Y. 566, 571; *Haxtun v. Corse*, 2 Barb. Ch. 506, 517; *Crooke v. County of Kings*, 97 N. Y. 421, 438-9; *Harrison v. Harrison*, 36 N. Y. 543, 546.

⁴ *Gilman v. Reddington*, 24 N. Y. 9, 13; see *Harrison v. Harrison*, 36 N. Y. 543, 546.

term, and that their interest as trust beneficiaries cannot continue beyond the trust term.¹

Illegal Term is not Presumed.

§ 114. The courts will not assume in the absence of proof, that the state of facts existing at the time of the creation of the estate was such as to render invalid the scheme of suspension set forth in the instrument.² For example, if a suspension is by the terms of a will to continue until five persons reach the age of thirty, the court will not assume that they were, at testator's death, then under that age.³ And if a will directs an accumulation of income for specified individuals, within a period of two designated lives (and where accordingly, to render the plan valid, the beneficiaries must be minors, as it is only for minors that accumulations can be made), the court will not assume that the beneficiaries, at the time of testator's death, were adults.⁴ Nor will a term of suspension, or of postponement of vesting, be prolonged, to its destruction, by mere inference or implication.⁵

§ 115. So a general and unlimited power of appointment to be exercised in the future, which does not require the creation of any illegal estate, will not be held

¹ Woodgate v. Fleet, 64 N. Y. 566, 571; Gilman v. Reddington, 24 N. Y. 9, 13; Harrison v. Harrison, 36 N. Y. 543; Frazer v. Hogue, 65 App. Div. 192; Underwood v. Curtis, 127 N. Y. 523, 538; Shepard v. Gassner, 41 Hun, 326; Schermerhorn v. Cotting, 131 N. Y. 48, 58; Denison v. Denison, 96 App. Div. 418, aff'd 183 N. Y. 505; Montanye v. Montanye, 29 App. Div. 377; Matter of Moloughney, 67 App. Div. 148. Some special considerations are discussed above, in connection with the additional term of a further minority in certain cases, and, in Chapter IV, in connection with trusts for accumulation.

² Matteson v. Palser, 173 N. Y. 404, 411-412 (and see the opinion below, 56 App. Div. 91, 95); Matter of Raymond, 73 App. Div. 11.

³ Matteson v. Palser, 173 N. Y. 404, 411-412.

⁴ Matter of Raymond, 73 App. Div. 11.

⁵ Locke v. F. L. & T. Co., 140 N. Y. 135, 149.

void merely because under it the donee might thereafter, without departing from the express language, attempt to create a suspension for an illegal term. Such a power is in legal effect a power to do what is lawful, and not what is unlawful.¹ But if such a power, which might be validly exercised, is in fact so exercised as to attempt to effect a suspension for an illegal term, its provisions, except in so far as the illegal provisions alone may be cut off, and the others saved, will be void.²

The "Statutory Period" for Contingencies.

§ 116. In this respect the statute³ clearly prescribes the term of two lives in being at the creation of the estate, with a further term of minority (in the case of real property) where the suspension, or the postponement of vesting,⁴ is occasioned by a contingent remainder in fee created on a prior remainder in fee, to take effect in the event specified in Real Property Law, § 42.⁵

The "Statutory Period" for Trusts to Apply Rents.

§ 117. This subject presents so many features which have no bearing on other topics of the present volume,

¹ *Hillen v. Iselin*, 144 N. Y. 365, 380; *Dana v. Murray*, 122 N. Y. 604, 613; *Root v. Stuyvesant*, 18 Wend. 257, where the dissenting opinions embody the correct rule; *Hone's Executors v. Van Schaick*, 20 Wend. 564, 566-7; *Crooke v. County of Kings*, 97 N. Y. 421, 445; *Hawley v. James*, 16 Wend. 61, 140, 175; *Radley v. Kuhn*, 97 N. Y. 26, 34; *Baker v. Lorillard*, 4 N. Y. 257, 270. See also as to imperative and discretionary powers, *Matter of Brown*, 154 N. Y. 313; *Smith v. Floyd*, 140 N. Y. 337; *Matter of Gantert*, 136 N. Y. 106; *Matter of Tatum*, 169 N. Y. 514; *Real Prop. L.*, § 157.

² Compare *Real Prop. L.* § 177 as to too extensive exercise of power, and *Root v. Stuyvesant*, 18 Wend. 257, 274; *Austin v. Oakes*, 117 N. Y. 577.

³ *Real Prop. L.* § 42.

⁴ *Matter of Wilcox*, 194 N. Y. 288.

⁵ Quoted *supra* § 30.

that it will, for greater convenience, be considered in Chapter IV.

The “ Statutory Period ” for Trusts to Accumulate Rents.

§ 118. In this case also, the special nature of the subjects to be considered renders it more appropriate to take them up for consideration in Chapter IV.

The “ Statutory Period ” as to Powers.

§ 119. For similar reasons, this subject will be considered in Chapter V, relating to suspension occasioned by powers.

The “ Statutory Period ” as to Chattels Real.

§ 120. The statute¹ renders applicable to chattels real, the provisions relative to future estates in real property, “ so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.”

The “ Statutory Period ” as to “ Disposition of Rents and Profits.”

§ 121. “ A disposition of the rents and profits of real property to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this article for future estates in real property.”²

The “ Statutory Period ” for Postponement of Vesting.

§ 122. This subject is discussed in Chapter VI.

¹ Real Prop. L. § 49.

² Real Prop. L. § 60. See *infra*, § 227.

The " Statutory Period " as to Personal Property.

§ 123. Except as applied to chattels real,¹ the maximum period for suspension of the absolute ownership of personal property is two lives in being in all cases.²

Certain Dispositions not Affected.

§ 124. All the illustrations of suspension thus far considered have been cases where the absence of " persons in being " was occasioned by some contingency, or some express trust, or by or in connection with some power, all of which are considered in detail in later chapters. It has often been said that apart from these three forms of interference with alienability, there are no other means by which a suspension of the absolute power of alienation can be effected.³

§ 125. In any event, and whatever the particular form of instrument or disposition in given cases, it is clear that what is restricted, by the statutes, within the appropriate " statutory period," is the term of suspension of the power of alienation, under Rule I, or under Rule II the term of postponement of vesting, or under Rule III the term of suspension of the absolute ownership of personal property. Provisions that do not occa-

¹ Under Real Property Law, § 49. *Supra*, § 120.

² See Chapter VII.

³ *Wilber v. Wilber*, 165 N. Y. 451, 456; *Dana v. Murray*, 122 N. Y. 604; *Everitt v. Everitt*, 29 N. Y. 39, 90; *Kane v. Gott*, 24 Wend. 641, 662; *Hawley v. James*, 16 Wend. 61, 121; *Coster v. Lorillard*, 14 Wend. 265, 305-6; 5 *Pai*, 218, 222, *et seq.*; *Radley v. Kuhn*, 97 N. Y. 26; *Robert v. Corning*, 89 N. Y. 225, 235; *Smith v. Edwards*, 88 N. Y. 92, 102; *Leonard v. Burr*, 18 N. Y. 96, 107. Many of the cases, indeed, state that there are only two forms of disposition, namely certain trusts and certain contingencies, which can occasion suspension. But as to the effect of certain powers, see Chapter V. *Matter of Butterfield*, 133 N. Y. 473; *Radley v. Kuhn*, 97 N. Y. 26, 34.

sion any such suspension or postponement are not affected by the requirements of those Rules.

§ 126. (a) Thus a mere provision for postponement of actual possession of property, real or personal, does not occasion any suspension of the power of alienation, either in the case of present estates or interests, beneficially vested in enjoyment,¹ or in the case of future estates beneficially vested in interest.² And so there is no "statutory period" within which the exercise of a power to so withhold must be restricted.³

§ 127. So far as concerns the postponed possession of a future estate, the proposition is obvious enough, because there is no reason why one's ownership of a future estate should suggest any idea of his having a present possession.⁴ But where the estate is a present estate,

¹ *Quade v. Bertsch*, 65 App. Div. 600, aff'd 173 N. Y. 615; *Starr v. Starr*, 132 N. Y. 154; *Radley v. Kuhn*, 97 N. Y. 26, 35-6; *Blanchard v. Blanchard*, 4 Hun, 287, aff'd 70 N. Y. 615; *Provost v. Provost*, 70 N. Y. 141, 146; *Henderson v. Henderson*, 113 N. Y. 1, 12; *Durfee v. Pomeroy*, 154 N. Y. 583, 595; *Warner v. Durant*, 76 N. Y. 133; *Williams v. Montgomery*, 148 N. Y. 519; *Smith v. Edwards*, 88 N. Y. 92; *Everitt v. Everitt*, 29 N. Y. 39, 75-9; *Hawley v. James*, 16 Wend. 61; *Post v. Hover*, 33 N. Y. 593; *Vanderpoel v. Loew*, 112 N. Y. 167, 186; *Vernon v. Vernon*, 53 N. Y. 351; *Oxley v. Lane*, 35 N. Y. 340, 347; *Robert v. Corning*, 89 N. Y. 225, 240; *Spitzer v. Spitzer*, 38 App. Div. 436; *Matter of Murphy*, 144 N. Y. 557; *Matter of Keogh*, 112 App. Div. 414, 418, aff'd 186 N. Y. 544. See also *Foote v. Bruggerhof*, 66 Hun, 406; *Matter of Becker*, 59 Misc. 135; *Orange County Trust Co. v. Morrison*, 56 Misc. 88; *Galway v. Bryce*, 10 Misc. 255; *Horndorf v. Horndorf*, 13 Misc. 343; *Neilson v. Brown*, 31 Misc. 562.

² *Murphy v. Whitney*, 140 N. Y. 541, 546; *Steinway v. Steinway*, 163 N. Y. 183, 195; *Gilman v. Reddington*, 24 N. Y. 9, 18; *Wells v. Squires*, 117 App. Div. 502, aff'd 191 N. Y. 529; *Bliven v. Seymour*, 88 N. Y. 469; *Matter of Bray*, 118 App. Div. 533; *Thieler v. Rayner*, 115 App. Div. 626, aff'd 190 N. Y. 546; *Shaw v. English*, 40 Misc. 37, 40; *Roberts' Will*, 98 N. Y. Supp. 809; *Matter of Perry*, 48 Misc. 285; also the cases referred to in connection with the subject of vesting, in Chapter III.

³ Cases above cited, and Chapter V.

⁴ *Bank of Niagara v. Talbot*, 110 App. Div. 519, aff'd 184 N. Y. 576.

and beneficially vested in enjoyment, free from any trust, the idea of postponing the actual possession presents, at least in some instances, peculiarities the detailed discussion of which would not be appropriate here.¹ The only feature of interest, from the point of view of suspension of alienability, is that if, in any given case, such mere postponement of possession is valid, it does not operate by itself alone to suspend alienability; and if, in any given case, it is void, its invalidity is due not to any infringement of the Rule in relation to alienability, but to other causes not here of interest.²

§ 128. (*b*) And the mere fact that under the terms of an instrument money is to be paid out in installments, to designated persons, together with the interest accruing upon the portions remaining undisbursed, does not in itself occasion any suspension of absolute ownership. And this is true even though executors may hold the fund as trustees and thus possess title as well as custody. For such an arrangement, even though a trust, is not such a trust as to prevent a transfer of interests by the beneficiary, and if such interests are vested, and under the terms of the gift may in fact be transferred at any time and a clear beneficial title conferred, there is no suspension of absolute ownership, for none of the elements of such ownership, in the sense of the statute, are lacking.³

¹ See § 504.

² With the New York cases cited above, compare *Williams on Executors*, 1505; *Curtis v. Lukin*, 5 Beav. 147, 155-6; *Rocke v. Rocke*, 9 Beav. 66; *Re Young's Settlement*, 18 Beav. 199; *Josselyn v. Josselyn*, 9 Sim. 63; *Grant v. Grant*, 3 Y. & C. 171; *Re Jacobs' Will*, 29 Beav. 402; *Gosling v. Gosling*, Johns. (Eng.) 265; *Marsden, Perpetuities*, 206; *Saunders v. Vautier*, 4 Beav. 115 (aff'd Cr. & Ph. 240); *Hilton v. Hilton*, L. R. 14 Eq. 468, 475; *Gray, Perpetuities*, 2nd. Ed. § 120, 121.

³ *Matter of Trumble*, 199 N. Y. 454; *Wells v. Squires*, 117 App. Div. 502, aff'd 191 N. Y. 529.

§ 129. (c) Cases of grants or devises, not in trust, accompanied by a prohibition against alienation, have sometimes been referred to as illustrating a suspension, or attempted suspension, of the absolute power of alienation. As to this point, it has been held that such a condition when imposed upon a grant or devise in fee, is in itself merely void, on the ground that a fee simple estate and a restraint upon its alienation cannot in their nature co-exist.¹ In *Oxley v. Lane*, 35 N. Y. 340, 346, 347, it is said that "There are cases where partial restraints upon the power of alienation, such as conditions not to sell to a particular person, or for a particular time, have been held good, but doubts have been expressed as to their correctness. (4 Kent, 131; *De Peyster v. Michael*, 6 N. Y. 467, per Ruggles, C. J., 495). In *Roosevelt v. Thurman* (1 Johns. Ch. 220), Chancellor Kent held, that a restriction upon a devisee in fee, that he should not dispose of the estate, until his eldest son should become of age, was void for repugnancy. It is not necessary, in the present case, to pronounce against the validity of all partial restraints of alienation in the case of estate in fee; it is enough to say, that they cannot be sustained, when they go beyond the limits fixed by the law of perpetuities. As the restrictions in the seventh item of the testator's will are repugnant to the devise, *and*² may suspend the power of alienation beyond two lives, they are void; but the devise is good, * * * ."

§ 130. The propositions quoted involve certain peculiarities in relation to questions which were not pre-

¹ *DePeyster v. Michael*, 6 N. Y. 467, 493, 508; *Hetzel v. Barber*, 69 N. Y. 1, 12; *Brown v. Brown*, 54 App. Div. 6; *Greene v. Greene*, 125 N. Y. 506, 512; *Lovett v. Gillender*, 35 N. Y. 617, 620, 628; *Wieting v. Bellinger*, 50 Hun. 324, 328; *Craig v. Wells*, 11 N. Y. 315, 322; *Hume v. Randall*, 141 N. Y. 499; *Deegan v. Wade*, 144 N. Y. 573, 578.

² Italics not in original.

sented in *Oxley v. Lane*,¹ and therefore not there discussed; for if such a restriction is repugnant to the primary gift, it would be void *per se*, without reference to the measure of its term; and if, on the other hand, it is not thus repugnant, but yet is void because it suspends the power of alienation for a period not duly measured by lives, then it would follow that such a case constitutes a further, and distinct form of suspension, in addition to such as may be caused by certain express trusts, or certain future contingencies, or certain forms of powers. It is believed, however, that the established principles which govern such cases are these; First, that such restrictions upon the alienation of a fee granted or devised, if general, are void merely because repugnant. This explains why, whether the term is measured by two lives or not, they are simply eliminated, leaving the grant or devise in force.² And secondly, that if there are any cases in which a partial restriction on alienation could be held free from objection based on the mere ground of repugnancy,³ still there is no suspension of the power of alienation on that account, because, so far as concerns the point now under consideration, and in the nature of the case, there would then either be persons in being who could in some form, and amongst them, get rid of the restriction and effect vesting somewhere of an alienable fee; or if such persons were not in being, then it would be *that* fact, involving some contingent future interest, that would be responsible for the suspension; and if they were in being, but were minors, and it is only on that account that they cannot convey, there would be no suspension in the sense of the statute.

¹ *Supra*.

² *Booker v. Booker*, 119 App. Div. 482; *Greene v. Greene*, 125 N. Y. 506, 512; *Rausch v. Rausch*, 21 N. Y. Supp. 786.

³ See *Craig v. Wells*, 11 N. Y. 315, 322; *Holden v. Rush*, 119 App. Div. 716.

§ 131. The principle that where an estate is given in one part of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause or subsequent words, which are not as clear and decisive as the words giving the estate,¹ deals directly not with what testator might do if he made his meaning clear, but only with what he will be presumed to have intended to do where the contrary intent is not clear; it is, therefore, not in point in the present discussion, which deals with cases where it is found that testator did intend to impose limitations upon a devise otherwise absolute, and where the question is whether such limitations are or are not valid. Nor are the cases here in point which hold that a fee may be granted or devised to one, subject to a power of sale conferred upon another. As such, those cases involve no question of suspension at all.²

§ 132. In the case of estates for life or years, and irrespective of whether the restraints on alienation in given cases may be lawful or unlawful on other grounds,³ the principles stated in § 130 would also apply to prevent any illegal suspension of the power of alienation.⁴

§ 133. And in general it is also to be noticed that in merely prohibiting alienation, without at the same time adopting a form of disposition such as to render alienation impossible, a grantor or testator must generally, and it seems invariably, fail to effectuate any suspension of the power to alienate. He may thus, indeed, in

¹ *Banzer v. Banzer*, 156 N. Y. 429, 435.

² *Crittenden v. Fairchild*, 41 N. Y. 289; *Kinnier v. Rogers*, 42 N. Y. 531; *Skinner v. Quin*, 43 N. Y. 99.

³ *DePeyster v. Michael*, 6 N. Y. 467, 491; *Holden v. Rush*, 119 App. Div. 716; see *Riggs v. Purcell*, 125 N. Y. 193, 199-201.

⁴ See also *Mandlebaum v. McDonell*, 29 Mich. 78, 86; *Hartung v. Witte*, 59 Wis. 285; *Bridge v. Ward*, 35 Wis. 687.

certain cases, incapacitate the grantee or devisee, for a time, from alienating, but he does not deprive himself, or his heirs, of the ability to annul the restriction by release or otherwise, and so he, or his heirs, and the grantee or devisee, may together effectuate a devolution of absolute title. A releasable restriction upon the power of alienation, does not suspend the power of alienation. The power is not suspended, for there are persons still left who can exercise it. The control over alienability is thus merely made to reside in a former owner, or his heirs, instead of in the present owner. But the Rule in relation to alienability has nothing to do with the particular place where the power to alienate shall reside. It is not its residence in one person instead of another, but its existence somewhere as contrasted with its non-existence anywhere, that forms the subject of the Rule. The validity or invalidity of given provisions merely purporting to locate the ability to alienate in some more or less unusual or unnatural place, is determined by other principles, which do not depend upon restriction of the term within the measure of lives in being. Thus such provisions differ from those which, by rendering absolute alienability impossible even though the grantor or the testator's representatives should join in an effort to revive and exercise the power to convey, occasion, in the sense of the statute, a suspension of the power of alienation.¹

§ 134. (d) So an agreement, or testamentary disposition, by a member of a partnership, providing for the continuance of an interest in the business, on behalf of his estate, after his death, does not by itself, where all interests are alienable and vested, effect any suspension of absolute ownership.²

¹ See also Chapter III. The test of validity under Rule II, is different.

² See Mr. Demarest's article in 23 Bench & Bar, 96, citing *Ross v. Harden*, 79 N. Y. 84, 91; *Nat. Bank of Newburgh v. Bigler*, 83 N. Y. 51, 57; *Bell*

§ 135. (e) And in *Williams v. Montgomery*,¹ it was held that an agreement, among owners of certificates of stock, to deposit them with a trust company, and not to withdraw them for six months except on mutual consent, did not constitute a suspension of absolute ownership, for the title was vested, and on mutual consent transferable, and for that matter any owner could sell his shares even without such consent, though he might not be able to actually deliver the certificates until later. And an investment of money by different persons in a common fund, to be held by a trust company for specified purposes, does not constitute a suspension, where the individual rights may be at any time transferred, and all interests are vested.²

§ 136. (f) The mere existence of a total or partial intestacy does not in itself occasion any suspension of the power of alienation, for the estate or interest not disposed of is necessarily represented by heirs, or executors, or administrators, or next of kin, who can dispose of it.

§ 137. (g) A mere contract not occasioning an absence of persons who can alienate property and not creating any contingent future interest in any property, cannot by its existence offend against either of the Rules relating respectively to alienability and vesting. Thus a promissory note payable at the end of a specified period of time after the maker's death, is valid.³

v. Hepworth, 134 N. Y. 442; Saperstein v. Ullman, 49 App. Div. 446, 448; Stewart v. Robinson, 115 N. Y. 328, 336. See also C. W. Co. v. Hodenpyl, 135 N. Y. 430; Matter of Myers, 131 N. Y. 409; Walker v. Steers, 38 State Reporter, 654, 14 N. Y. Supp. 398; Vernon v. Vernon, 53 N. Y. 351; Thorn v. De Breteuil, 179 N. Y. 64; Matter of Slocum, 169 N. Y. 153; Master of Snyder, 21 N. Y. Supp. 430; Matter of O'Reilly, 59 Misc. 136.

¹ 148 N. Y. 519.

² Brown v. The Mutual Trust Co., 22 Weekly Dig. 395.

³ Carnwright v. Gray, 127 N. Y. 92; Hegeman v. Moon, 131 N. Y. 462.

In *Syms v. Mayor*,¹ it is said that a covenant, in a lease for years, calling for future renewals each to contain an identical provision for future renewals, without end, would "tend to create a perpetuity." But as it would in any event always be releasable by the parties, there could be no suspension of alienability under Rule I, and it would seem equally clear that no view of the facts could present any case of postponement of vesting of a "remainder" under Rule II.²

§ 138. Indeed, as the necessity for restriction within the statutory period only applies to cases where alienability is suspended, or vesting postponed, all dispositions which involve the presence of persons in being who can convey an absolute fee constitute illustrations of cases not affected by Rule I; and all in which the remainders created are vested, constitute illustrations of cases not affected by Rule II. And other illustrations of situations where the restrictions of those Rules do not apply, because the provisions in question involve no suspension of alienability, and no postponement of vesting, will be found in the various connections where the several features of the Rules are discussed in later Chapters.³

¹ 18 J. & S. 289.

² See Chapter VI, and § 162.

³ See in particular §§ 160-163.

CHAPTER III.

SUSPENSION OCCASIONED BY CONTINGENCIES.

§ 139. Suspension of the absolute power of alienation may be occasioned by certain contingencies, by certain express trusts, and by, or in connection with, certain powers. This present Chapter deals with suspension as occasioned by contingencies.

§ 140. The test of the existence of a suspension, however occasioned, is furnished by § 42 of the Real Property Law, which provides that "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate," and in certain specified cases a further minority.¹ We must, therefore, apply this statutory test to the various forms of estates, in order to ascertain which can occasion a suspension.

§ 141. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.² As an estate in possession is one which entitles the owner to the immediate possession of the

¹ Also Real Prop. L. §§ 49, 50, 60, 131, 144, 178, 179. This test is not, however, applicable to questions arising under Rule II, § 4, which relates not to alienability, but to vesting.

² Real Prop. L. § 35.

property,¹ and, unless held upon certain trusts,² is necessarily alienable,³ it cannot cause any suspension of the power of alienation, on account of any contingency. Estates in expectancy are either reversions or future estates.⁴ As to reversions, their nature is such that whether vested or contingent,⁵ they are necessarily represented at all times by persons in being who can alienate them for what they may prove to be worth,⁶ and therefore they cannot occasion a suspension.⁷ As to the other class of expectant estates, namely future estates, they are either vested or contingent.⁸ A future estate "is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."⁹

§ 142. Now the term "vested" is employed in the law in several different senses, as follows:

§ 143. (1) An estate is *vested in possession* when there is an immediate fixed right of present enjoyment.¹⁰ Thus, if a present estate for life, or in fee, be devised to A, he takes, immediately upon testator's death, a vested estate in possession. When used in this sense, the term "vested estate" is synonymous with the statutory term "estate in possession."

¹ Id. § 35.

² Chapter IV.

³ Real Prop. L. § 59.

⁴ Real Prop. L. § 36.

⁵ *Floyd v. Carow*, 88 N. Y. 560.

⁶ Real Prop. L. § 59.

⁷ *Woodgate v. Fleet*, 44 N. Y. 1; *Barber v. Brundage*, 169 N. Y. 368; *Doane v. Mercantile Trust Co.*, 160 N. Y. 494.

⁸ Real Prop. L. § 40.

⁹ Real Prop. L. § 40.

¹⁰ *Matter of Brandreth*, 169 N. Y. 437, 441.

§ 144. (2) An estate is *vested in interest*, when there is a present fixed right of future enjoyment.¹ Thus, if an estate be devised to A for life, remainder to B in fee, here the remainder vests in interest in B.²

§ 145. When we speak of a "vested remainder," the term is to be understood in the sense of "vested in interest." As soon as it vests in possession, it ceases to be a remainder at all.³

§ 146. (3) An estate may be *vested subject to being divested*. This proposition applies both to present,⁴ and to future estates;⁵ and they may be defeasible either in whole,⁶ or in part.⁷ Illustrations may be found in the case of estates vested subject to open and let in new interests, with resulting partial divesting of the shares previously vested,⁸ and in such cases the

¹ Hawley v. James, 5 Pal. 318, 466; Gott v. Cook, 7 Pal. 521, 543.

² For a case illustrating the vesting of a remainder, first in interest, and subsequently in possession, see Helck v. Reinheimer, 105 N. Y. 470, 475.

³ The principles of construction which are resorted to for aid in distinguishing between vested and contingent future estates, are considered in Chapter XI.

⁴ Henderson v. Henderson, 113 N. Y. 1, 13; Herriot v. Prime, 155 N. Y. 5; Matter of Cramer, 170 N. Y. 271.

⁵ Manice v. Manice, 43 N. Y. 303; Roome v. Phillips, 24 N. Y. 463; Kelso v. Lorillard, 85 N. Y. 177; DuBois v. Ray, 35 N. Y. 162; Avery v. Everett, 110 N. Y. 317, 321; Kernochan v. Marshall, 165 N. Y. 472; Lyons v. Ostrander, 167 N. Y. 135; Matteson v. Palser, 173 N. Y. 404, 410; People's Trust Co. v. Flynn, 188 N. Y. 385; Stringer v. Young, 191 N. Y. 157. Compare future estate not divested by death in the meantime, Matter of Brown, 154 N. Y. 313.

⁶ Beardsley v. Hotchkiss, 96 N. Y. 201, 213; Mead v. Mitchell, 17 N. Y. 210, 213; Corse v. Chapman, 153 N. Y. 466.

⁷ Van Aste v. Fisher, 117 N. Y. 401; Gilman v. Reddington, 24 N. Y. 9; Steinway v. Steinway, 163 N. Y. 183.

⁸ Byrnes v. Stilwell, 103 N. Y. 453; Monarque v. Monarque, 80 N. Y. 320, 325; Stevenson v. Lesley, 70 N. Y. 512; Kent v. Church of St. Michael, 136 N. Y. 10; Steinway v. Steinway, 163 N. Y. 183.

estate of a given person may,¹ or may not,² according to the terms of the instrument, be wholly divested by his death during the specified period.

§ 147. (4) There may be a *vested right to a future contingent estate*. For when the contingency is due only to the uncertainty of the event, but the person is certain in whom, or whose heirs or grantees as such, the contingent estate will certainly vest in interest, if it ever does vest at all, his right is said to be a vested right. Thus if a future estate be devised in the following terms: "Should A die without leaving any issue, then to B and his heirs," here, during the life of A, the remainder to B is contingent. But its contingent nature results from the uncertainty of A's dying without issue, and not from any uncertainty about B's right to the remainder, if A does die without issue. Consequently although the estate is contingent, the right is vested.³ If B dies intestate before A, his vested right descends to his heirs, and if A then dies without issue, B's heirs take the estate in possession. But it is important here to notice, that just as the fact that a future estate is vested, is not inconsistent with its being subject to being divested, so also the fact that the right to a contingent estate is vested, as above set forth, is not necessarily inconsistent with its being likewise subject to defeat under certain circumstances, even though the

¹Tucker v. Bishop, 16 N. Y. 402; Smith v. Scholtz, 68 N. Y. 41; Baker v. Lorillard, 4 N. Y. 257; Corse v. Chapman, 153 N. Y. 466.

²Matter of Brown, 93 N. Y. 295; Tucker v. Bishop, 16 N. Y. 402; Surdam v. Cornell, 116 N. Y. 305; Steinway v. Steinway, 163 N. Y. 183.

³2 Washburn, Real Property, 5th Ed. 775; Hennessy v. Patterson, 85 N. Y. 91; Nellis v. Nellis, 99 N. Y. 505, 516; Ham v. Van Orden, 84 N. Y. 257, 270; Roosa v. Harrington, 171 N. Y. 341, 353; Matter of Cramer, 170 N. Y. 271, 277; Matter of Wilcox, 194 N. Y. 288, 296; Matter of Watts, 68 App. Div. 357, 359.

specified contingency happens. It is a question of intent.¹

§ 148. (5) So on the other hand, it is sometimes said that an estate is "vested contingently;"² the meaning of which is, that it is vested, subject to being divested upon the happening of some specified contingency. The term "vested" is sometimes employed in still other senses. Thus, it is used in the sense of "alienable;"³ or of "inviolable," or of "non-defeasible."⁴

§ 149. Now if a given future estate is vested (otherwise than upon certain express trusts, Chapter IV), and irrespective of whether or not it is vested absolutely or subject to being divested in whole or in part, it may itself be aliened for what it may prove to be worth,⁵ and thus cannot itself through any contingency, occasion a suspension of the power of alienation.⁶ If there is in such a case any suspension, the contingency that occasions it must be due to some other estate, interest or possibility.⁷

§ 150. For the fact that a given estate less than a fee, whether present or future, and if future then

¹ *Byrnes v. Stilwell*, 103 N. Y. 453; *Matter of Keogh*, 126 App. Div. 285, *aff'd* 193 N. Y. 602; *Kelso v. Lorillard*, 85 N. Y. 177.

² *Matter of Cramer*, 170 N. Y. 271, 277.

³ *Paget v. Melcher*, 156 N. Y. 399, 405-6.

⁴ *Id.* See *Gray, Perpetuities*, 2nd Ed., § 118.

⁵ *Real Prop. L.* § 59; *Griffin v. Shepard*, 124 N. Y. 70, 76; *Nellis v. Nellis*, 99 N. Y. 505, 516; *Sawyer v. Cubby*, 146 N. Y. 192; *Vanderpoel v. Loew*, 112 N. Y. 167, 181, 186; *Lewisohn v. Henry*, 179 N. Y. 352, 361; *Goebel v. Wolf*, 113 N. Y. 405; *Henderson v. Henderson*, 113 N. Y. 1, 14; *Matter of Young*, 145 N. Y. 535; *Byrnes v. Stilwell*, 103 N. Y. 453, 462.

⁶ Cases last cited; *Hannan v. Osborn*, 4 *Pai.* 336; *Robert v. Corning*, 89 N. Y. 225, 241.

⁷ *Cochrane v. Schell*, 140 N. Y. 516, 539; *Mead v. Mitchell*, 17 N. Y. 210; *Monarque v. Monarque*, 80 N. Y. 320; *Kent v. Church of St Michael*, 136 N. Y. 10; *Moore v. Littel*, 41 N. Y. 66, 77, 81, 83, 85, 86; *Taggart v. Murray*, 53 N. Y. 233, 238-9.

whether vested or contingent, is itself alienable, does not necessarily mean that there is no suspension of the power to convey a fee in possession. The fact that it is alienable, only means that it does not itself occasion any suspension. There may still be some other estate, or chance of acquiring an estate, by which suspension is occasioned.¹ Where a future estate is held to be vested subject to possible defeasance in favor of others,² it necessarily follows that there is also a contingent estate or possibility of acquiring an estate, in favor of the latter;³ and if they may be persons not yet in being, this contingent estate is such as to effect a suspension of the power of alienation.⁴ For contingencies or conditions from the point of view of the respective estates affected by them, have a double nature and are both precedent and subsequent.⁵

§ 151. Every contingency subsequent, which sets a limit at which an earlier vested estate may come to an end, is also a contingency precedent which marks the line where a later estate may begin. It follows one estate, but it precedes another.⁶ In *Moore v. Littel*,⁷ where property was left to A for life, remainder to his heirs, the remainder was treated as vested during A's life, subject to open and let in new "heirs," and thus

¹ *Moore v. Littel*, 41 N. Y. 66, 77, 81, 83, 85, 86; *Taggart v. Murray*, 53 N. Y. 233, 238-9; *Matter of Curtis*, 142 N. Y. 219; and cases cited in § 149.

² See cases cited, *supra*, § 146.

³ § 146. *Doscher v. Wyckoff*, 132 App. Div. 139.

⁴ § 146. See *Schwartz v. Reh fuss*, 129 App. Div. 630, *aff'd* 198 N. Y. 585.

⁵ 2 Blackstone Comm. 154; *Young Women's Christian Home v. French*, 187 U. S. 401; *Towle v. Remsen*, 70 N. Y. 303, 311; *Graves v. Deterling*, 120 N. Y. 447, 455.

⁶ *Knowlton v. Atkins*, 134 N. Y. 313, 318. Conditions and limitations, *Williams v. Jones*, 166 N. Y. 522, 537-8; *U. S. Trust Co. v. Hogencamp*, 191 N. Y. 281, 285.

⁷ *Supra*.

subject to partial defeat, and also to total defeat in case of the death of any "heir" during A's life. This scheme effected a suspension of the power of alienation for one life, but the suspension was caused not by the estates which were vested, but by the possibility that the vested interest of the existing presumptive heirs might be partially or wholly defeated by new members of the class who might yet come into being and take on their own account as purchasers, and whose potential estates, in the meantime, could not be conveyed, because there was no one to represent them.¹

§ 152. Passing, then, to the consideration of contingent estates, we find them divided into two classes. For as seen from the statutory definition, a given future estate may, in the first place, be contingent because the *event* on which it is limited to take effect is uncertain, even though the person to whom it is limited to take effect is an ascertained person in being. This is the class of cases mentioned above, as constituting, or in any event including, vested rights to contingent estates. And under the terms of Real Property Law, § 59, every expectant estate (thus including every future estate),² is alienable, in the same manner as an estate in possession.³ It follows, therefore, that the ascertained person in being to whom it is limited to take effect may convey it, though only of course according to its nature as an estate which may never vest all.⁴

¹ Moore v. Littel, 41 N. Y. 66, 77, 81, 83, 85, 86; Cochrane v. Schell, 140 N. Y. 516, 539; Matter of Curtis, 142 N. Y. 219. And so, also, postponement of vesting existed as to the potential future estates in favor of persons who might yet come into being, Chapter VI.

² Real Prop. L. § 36.

³ Chester v. Jumel, 125 N. Y. 237, 252; Nellis v. Nellis, 99 N. Y. 505.

⁴ Griffin v. Shepard, 124 N. Y. 70, 76; Roosa v. Harrington, 171 N. Y. 341, 353; Sawyer v. Cubby, 146 N. Y. 192; Dougherty v. Thompson, 167

§ 153. It will be seen that between future estates "vested subject to being divested," and "vested rights in contingent estates," there are certain striking grounds of similarity.¹ In both cases the person representing the estate or right is *in esse* and ascertained. In both it is possible that events may turn out so that his estate or right is afterward cut off, or expires, or comes to nothing. But in one case his estate is already begun, and will continue on and ultimately vest in possession unless or until it is cut short or expires, on the happening of a condition or contingency subsequent;² while in the other case its very beginning is dependent upon the happening of a condition or contingency precedent, before it can ever come into his possession; unless this happens he will never take anything.³

N. Y. 472; Knowlton v. Atkins, 134 N. Y. 313; Peterson v. DeBaun, 36 App. Div. 259; Curtis v. Fowler, 66 Mich. 698; Hennessy v. Patterson, 85 N. Y. 91; 2 Washburn on Real Property, 775 *et seq.*; Moore v. Littel, 41 N. Y. 66, 83, *et seq.*; Kelso v. Lorillard, 85 N. Y. 177, 184; Ham v. Van Orden, 84 N. Y. 257, 270; Dodge v. Stevens, 105 N. Y. 585; Leonard v. Burr, 18 N. Y. 96.

¹ Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 132-3.

² Roome v. Phillips, 24 N. Y. 463.

³ Roosa v. Harrington 171 N. Y. 341, 353; See Leonard v. Burr, 18 N. Y. 96; Robert v. Corning, 89 N. Y. 225, 241, Hannan v. Osborn, 4 Pal. 336, 342.

See also Townshend v. Frommer, 125 N. Y. 446, described in Campbell v. Stokes, 142 N. Y. 23, 30, as "peculiar and anomalous;" Curtis v. Murphy, 129 N. Y. 645; Moore v. Appleby, 108 N. Y. 237; Paget v. Melcher, 156 N. Y. 399; Cochrane v. Schell, 140 N. Y. 516, 526, 539; and illustrative cases of vesting and possibilities of divesting, under the tax laws. Matter of Hoffman, 143 N. Y. 327, 334; Matter of Curtis, 142 N. Y. 219; Matter of Lansing, 182 N. Y. 238; Matter of Seaman, 147 N. Y. 69; Matter of Davis, 149 N. Y. 539; Matter of Roosevelt, 143 N. Y. 120.

If a remainder is contingent upon the remainderman's surviving the life estate, or is vested subject to being divested by his death during the life estate, and during the life estate he dies, his devise of the remainder is necessarily ineffective *in toto*, for his death, which brings his will into operation, also terminates the estate which he has attempted to devise. Denison v. Denison, 96 App. Div. 418, *aff'd* 183 N. Y. 505; see Hennessy v. Patterson, 85 N. Y. 91.

§ 154. As an estate contingent only on account of the uncertainty of the event may be conveyed, *it* cannot cause a suspension of the absolute power of alienation.¹ And if there is in such a case, any suspension occasioned by a contingency, it must be caused not by the contingent estate which can be conveyed, but by some other estate, or potential estate, which is contingent for some reason which renders it non-conveyable.

§ 155. We may, accordingly, lay aside future estates which are contingent solely on account of the uncertainty of the event, and take up for examination the other class of contingent future estates,² namely, those which are contingent, either solely or partly because the *persons* to whom they are limited to take effect are uncertain.³

§ 156. The statute does not subdivide this latter class, but it is capable of subdivision, and for the purposes of our present inquiry such a subdivision is essential. It will be noticed that the uncertainty which exists in regard to the person to whom the estate is limited to take effect, may relate to either of two distinct states of fact.

§ 157. For in the first place, the uncertainty may arise out of the fact that while it is certain that the estate in question, under the limitations of the instrument creating it, will vest, if it ever vests at all, in some one or more of a group of now living persons, or in their heirs, grantees or devisees as such and not as

¹Pickert v. Windecker, 73 Hun, 476; Murphy v. Whitney, 140 N. Y. 541, 546; Mott v. Ackerman, 92 N. Y. 539, 550; Nellis v. Nellis, 99 N. Y. 505, 516. But it may still, though alienable, be objectionable under Rule II, *supra*, because not certain to vest in due time.

²Real Prop. L. § 40.

³Haynes v. Sherman, 117 N. Y. 433, 439.

“purchasers,” yet it is impossible in the meantime to determine which particular member of the group is the one in whom it will yet so vest, if at all. Now this uncertainty, while rendering the estate contingent, does not in the smallest degree diminish the power to convey the estate; for a conveyance of the estate in question, if executed by all the members of the group, must by the terms of the definition, include a conveyance by the one or more in whom, or in whose grantees or heirs or devisees as such, the estate in question must vest if it vests at all, and therefore such a conveyance would necessarily alien the entire estate in question. In other words there are, in such a case, persons in being by whom that particular estate may be conveyed, and so *it* cannot cause any suspension of the absolute power of alienation.¹ We may, therefore, also lay aside this class.

§ 158. In the second place, however, the uncertainty as to the person may be not merely an uncertainty as to which of several persons in being will prove to be the particular one in whom, under the terms of the instrument, the estate will vest, if it vests at all, but an uncertainty arising from the fact that the person who may yet prove to be the one entitled under the limitations of the instrument is, or, may be, a person not now in being.² This is the only remaining class of contingent

¹ *Mott v. Ackerman*, 92 N. Y. 539, 550; *Sawyer v. Cubby*, 146 N. Y. 192; *Griffin v. Shepard*, 124 N. Y. 70, 76; *Dougherty v. Thompson*, 167 N. Y. 473; *Knowlton v. Atkins*, 134 N. Y. 313; *Peterson v. DeBaun*, 36 App. Div. 259; *Denison v. Denison*, 96 App. Div. 418, *aff'd* 183 N. Y. 505; *Yates v. Yates*, 9 Barb. 324, 347. On the ground of undue suspension occasioned by contingencies it would seem difficult to explain the decision in *Sanford v. Goodell*, 82 Hun, 369, for all the estates, vested or contingent, were represented by designated persons in being who, by uniting, could at any time convey an absolute fee. But alienability is not the test of validity under Rule II, which relates to vesting. See Chapter VI.

² *Sawyer v. Cubby*, 146 N. Y. 192, 199; *Cochrane v. Schell*, 140 N. Y. 516, 539; *Taggart v. Murray* 53 N. Y. 233, 238-9.

future estates, and it must therefore be here that we shall find the particular form of contingency by which suspension is effected. And the mere definition of the class shows that all cases falling within its terms must effect suspension. For no conveyance that might be made, even though executed by all the persons in being in whom it might yet vest, could possibly operate to cut off the chance that it might yet vest not in them, but, in his own right as "purchaser," in a person not now in being. Under such circumstances no joinder of parties could effect a conveyance of an absolute fee, and accordingly the absolute power of alienation is suspended.¹ In case of a disposition of real or personal property, therefore, the test of a suspension of alienability due to a contingency is, whether, on the one hand, the persons who are to take are all designated persons in being,² or on the other hand may be, or include, persons not yet in being.³ In the former case there is no suspension of alienability, and in the latter there is.⁴ Whether or not a suspension thus occa-

¹ *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 100; *Taggart v. Murray*, 53 N. Y. 233, 238-9; *Murphy v. Whitney*, 140 N. Y. 541, 546; *Hobson v. Hale*, 95 N. Y. 588, 612, 613; *Kilpatrick v. Barron*, 54 Hun, 322, and 125 N. Y. 751; *Graham v. Fountain*, 2 N. Y. Supp. 598; *Cochrane v. Schell*, 140 N. Y. 516, 539; *Dana v. Murray*, 122 N. Y. 604, 617; *Radley v. Kuhn*, 97 N. Y. 26, 35; *Genet v. Hunt*, 113 N. Y. 158, 169; *Trowbridge v. Metcalf*, 5 App. Div. 318, 324, *aff'd* 158 N. Y. 682; *Manice v. Manice*, 43 N. Y. 303, 362; *Jenkins v. Fahey*, 73 N. Y. 355, 358-9; *Ward v. Ward*, 105 N. Y. 68, 75; *Delaney v. McCormack*, 88 N. Y. 174, 183; *Smith v. Floyd*, 140 N. Y. 337; *Matter of Baer*, 147 N. Y. 348, 354; *Campbell v. Stokes*, 142 N. Y. 23, 30; *Townshend v. Frommer*, 125 N. Y. 446; *Paget v. Melcher*, 156 N. Y. 399; *McGillis v. McGillis*, 154 N. Y. 532; *Guernsey v. Van Riper*, 126 App. Div. 368; *Haynes v. Sherman*, 117 N. Y. 433, 439; *Sawyer v. Cubby*, 146 N. Y. 192, 199; *Forsyth v. Rathbone*, 34 Barb. 388. In personal property, the same class of contingencies effect the same result. Chapter VII.

² *Hersee v. Simpson*, 154 N. Y. 496; *Matter of Young*, 145 N. Y. 535.

³ *McGillis v. McGillis*, 154 N. Y. 532.

⁴ *Matter of Smith*, 131 N. Y. 239, 247; *Teed v. Morton*, 60 N. Y. 502; *Tucker v. Bishop*, 16 N. Y. 402; *Bisson v. W. S. R. R. Co.*, 143 N. Y.

sioned is lawful, depends on whether or not the term during which it may continue is duly limited.¹

§ 159. The question of whether an estate is vested or contingent generally arises in cases where its validity depends on its being held to be vested. But sometimes the situation is reversed, and the validity of the devise depends on its being held contingent, as for instance, where there is a devise to a corporation not yet organized.²

§ 160. Thus far we have been discussing "estates." That term, so far as concerns the present subject, is broad enough to include, and to subject to the same principles, all present rights and interests, either vested or contingent, which may by possibility develop into estates at a future day.³ They are in any event potential estates, and do or do not occasion a suspension of the power of alienation, according as they do or do not involve an absence of persons in being who can convey an absolute fee in possession. But in addition to such

125; *Cochrane v. Schell*, 140 N. Y. 516, 539. As to the scope of the statute relating to suspension of the absolute ownership of personal property, see Chapter VII. The person in whom an estate may yet vest and whose non-existence in the meantime causes a suspension of the power of alienation, may be a corporation not yet created. *Lougheed v. D. B. Church*, 129 N. Y. 211; *Booth v. Baptist Church*, 126 N. Y. 215, 240. See also Chapter VIII.

¹ *Hillen v. Iselin*, 144 N. Y. 365, 378; *Lougheed v. D. B. Church*, 129 N. Y. 211; *Van Nostrand v. Marvin*, 16 App. Div. 28, 161 N. Y. 650; *Sawyer v. Cubby*, 146 N. Y. 192; *Purdy v. Hayt*, 92 N. Y. 446, 456; *Cochrane v. Schell*, 140 N. Y. 516, 525, 539; *Monarque v. Monarque*, 80 N. Y. 320; *Brown v. Evans*, 34 Barb. 594; *Altrock v. Vandenburg*, 25 N. Y. Supp. 851.

² *Lougheed v. D. B. Church*, 58 Hun, 364, 129 N. Y. 211; *Plymouth Society v. Hepburn*, 57 Hun, 161; *Burrill v. Boardman*, 43 N. Y. 254, 258; *McGillis v. McGillis*, 154 N. Y. 532, 545. See *Fearne on Contingent Remainders*, 536; *Drake v. Pell*, 4 Edw. Ch. 251, 268-9.

³ *Nicoll v. N. Y. & E. R. Co.*, 12 N. Y. 121, 133.

estates or interests, there are certain chances, or possibilities, which must also be considered.

§ 161. Illustrations of this class may be found in rights of entry for condition broken and possibilities of reverter.¹ Such possibilities cannot operate in themselves to occasion a violation of Rule I, relating to alienability, because, even where not of such nature as to be assignable, they may be released.² Nor, it may be said in passing, can they occasion a violation of Rule II, relating to vesting, for that deals exclusively with what may be *created* and not with what may be reserved.³

§ 162. So options, and other contracts affecting lands, can be released, and thus do not occasion any suspension of alienability under Rule I, and no matter how broadly the term "remainder" may be construed, they are not within it and therefore cannot effect any postponement of vesting under Rule II.

§ 163. Mortgages cannot occasion suspension, for they may be released, and the mortgagor and mortgagee can by uniting convey an absolute fee.⁴ Nor can they offend

¹ *Uppington v. Corrigan*, 151 N. Y. 143; *Fowler v. Coates*, 201 N. Y. 257, 263; *Plumb v. Tubbs*, 41 N. Y. 442; *Matter of Hart*, 61 App. Div. 587, aff'd 168 N. Y. 640; *Vail v. L. I. R. R. Co.*, 106 N. Y. 283; *Leonard v. Burr*, 18 N. Y. 96; *Lougheed v. D. B. Church*, 129 N. Y. 211; *Storer v. Eyclesheimer*, 4 Abb. Ct. App. Dec. 309; *Miller v. Emans*, 19 N. Y. 384; *Gibert v. Peteler*, 38 N. Y. 165; *DePeyster v. Michael*, 6 N. Y. 467; *Birdsall v. Grant*, 37 App. Div. 348; *Rose v. Hawley*, 118 N. Y. 502; *Adams v. Perry*, 43 N. Y. 487, 490, 496; *Thayer v. McGee*, 20 Mich. 195; *Smith v. Barrie*, 56 Mich. 315; *Mandlebaum v. McDonell*, 29 Mich. 78; *Horner v. Chicago, etc. Co.*, 38 Wis. 165; *Mills v. Evansville Seminary*, 58 Wis. 135; *Challis on Real Property*, 63; *Reeves, Real Property*, Vol. II, §§ 719-726.

² *Uppington v. Corrigan*, and other cases last cited.

³ See Chapter VI.

⁴ *Hawley v. James*, 16 Wend. 61, 179, and 259.

against Rule II, as to vesting, because they create no future estate. Of course the absolute ownership of the mortgage itself may be suspended, as in the case of any other property.¹ Similar principles apply to docketed judgments; escheat;² covenants, reservations and easements.³

§ 164. The bearing of the foregoing sections upon dispositions of personal property, is discussed in Chapter VII.

¹ Harris v. Clark, 7 N. Y. 242, 244, 260.

² Wadsworth v. Wadsworth, 12 N. Y. 376, 379, 381; Wright v. Saddler, 20 N. Y. 320, 329.

³ Trustees v. Lynch, 70 N. Y. 440, 452; Tallmadge v. The East River Bank, 26 N. Y. 105, Hill v. Miller, 3 Pai. 254; Trustees of Watertown v. Cowen, 4 Pai. 510; Barrow v. Richard, 8 Pai. 351; Curtiss v. Ayrault, 47 N. Y. 73; Cady v. S. W. W. Co., 134 N. Y. 145, see 13 Abb. N. C. 105, note. The fact that a devise is on condition that after the devisee, a convict, is liberated from prison he shall live on the devised premises and furnish his mother and sister with firewood and board, does not effect a suspension. The title vests immediately upon testator's death subject, if technically upon condition at all, to a condition subsequent which could always be avoided by a joint conveyance, or at any rate by a release. LaChapelle v. Burpee, 69 Hun, 436. For other illustrations of dispositions not affected by the Rules, see §§ 124-138, *supra*, and the following chapters.

CHAPTER IV.

SUSPENSION OCCASIONED BY EXPRESS TRUSTS.

THE FOUR CLASSES OF EXPRESS TRUSTS.

THE TRUSTEE AND THE BENEFICIARY.

WHAT TRUSTS OCCASION SUSPENSION.

LEASES UNDER EXPRESS TRUSTS.

TRUST TO SATISFY MORTGAGE FROM RENTS.

TRUST TO PAY ANNUITY FROM RENTS.

STATUTORY PERIOD FOR TRUSTS TO ACCUMULATE.

STATUTORY PERIOD FOR TRUSTS TO APPLY RENTS.

COMBINATION OF DIFFERENT TRUSTS AND POWERS.

RENTS AND PROFITS UNDISPOSED OF.

§ 165. In the Notes to their draft of the Revised Statutes the Revisers say that "an estate is never inalienable unless there is a contingent remainder, and the contingency has not yet occurred."¹ In consequence of the unfortunate form of this statement, a question early arose as to whether a suspension of the power of alienation could be occasioned, in the absence of a contingent remainder, by a present estate vested in the trustee of an express trust.² But the courts have recognized and established the full application of the principle embodied in Rule I, relating to alienability, to present express trusts as well as to future contingencies.³

§ 166. But just as it is not every contingent future estate, so it is not every form of express trust, that

¹ 5 Stat. at Large (Edmonds), Appendix, 307.

² Kane v. Gott, 24 Wend. 641, 662, and opinion of McCoun, V. C., in Lorillard v. Coster, 5 Pai. 172, 188 *et seq.*

³ See §§ 222-237.

occasions a suspension.¹ The test is in both cases the same; for "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed."² We have just examined, in Chapter III, the subject of suspension occasioned by the fact that some contingent estate may yet vest in persons not now in being, and for that reason an absolute fee cannot be conveyed. We are now, however, in taking up the subject of suspension occasioned by express trusts, to examine a class of cases where all the estates and interests which go to make up an absolute fee, may be vested in "persons in being," but yet some of those persons, in consequence of certain restrictions imposed by statute upon their freedom to convey, are not persons in being by whom a conveyance can be made.³

The Four Classes of Express Trusts.

§ 167. In applying to express trusts of real property this statutory test of the presence or absence of the absolute power of alienation we have in addition to trusts for charities, which are treated in a later chapter, only four classes of trusts to deal with. The Real Property Law, § 96, provides that "An express trust may be created for one or more of the following purposes: ⁴

¹ *Murphy v. Whitney*, 140 N. Y. 541, 546.

² *Real Prop. L.*, § 42.

³ *Murphy v. Whitney*, 140 N. Y. 541, 546.

⁴ Method and form of creating and declaring express trusts. *Ashe v. Ashe*, 113 N. Y. 232; *Stevenson v. Lesley*, 70 N. Y. 512; *Johnston v. Spicer*, 107 N. Y. 185; *Douglas v. Cruger*, 80 N. Y. 15; *Nearpass v. Newman*, 106 N. Y. 47; *Wallace v. Berdell*, 97 N. Y. 13; *Thebaud v. Schermerhorn*, 30 Hun, 332; *Van Cott v. Prentice*, 104 N. Y. 45; *Cook v. Barr*, 44 N. Y. 156; *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 492; *Young v. Young*, 80 N. Y. 422; *Beaver v. Beaver*, 117 N. Y. 421; *Martin v. Funk*, 75 N. Y. 134; *Hutchins v. Van Vechten*, 140 N. Y. 115;

"1. To sell real property for the benefit of creditors;

"2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

"3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;¹

"4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."²

§ 168. "Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished."³

Wendt v. Walsh, 164 N. Y. 154; Jacobs v. Morrison, 136 N. Y. 101; Kirsch v. Tozier, 143 N. Y. 390; McPherson v. Rollins, 107 N. Y. 316; McArthur v. Gordon, 126 N. Y. 597. As to declaration of trust of personal property, see Wadd v. Hazelton, 137 N. Y. 215; Govin v. de Miranda, 140 N. Y. 474 and 662; Locke v. F. L. & T. Co., 140 N. Y. 135. Chaplin, Express Trusts and Powers, pp. 27-67.

¹ As in the first and second class, so the beneficiaries of a trust of this third class need not be infants or married women; or improvident or incompetent persons. Such a trust may be created for the benefit of any person. A dictum to the contrary in Radley v. Kuhn, 97 N. Y. 26, 32, does not represent the now established principle. Cochrane v. Schell, 140 N. Y. 516, 533. For various forms of expressing a trust of this class, see Vernon v. Vernon, 53 N. Y. 351, 359; Van Cott v. Prentice, 104 N. Y. 45; Leggett v. Perkins, 2 N. Y. 297; Marx v. McGlynn, 88 N. Y. 357, 375 (compare Wetmore v. Truslow, 51 N. Y. 338); Cruger v. Douglas, 4 Edw. Ch. 433, 446, 510, aff'd 5 Barb. 225; DeKay v. Irving, 5 Den. 646, 651; Morse v. Morse, 85 N. Y. 53; Hubbard v. Housley, 43 App. Div. 129, 160 N. Y. 688; Holly v. Hirsch, 135 N. Y. 590; Kiah v. Grenier, 56 N. Y. 220, 225; Verdin v. Slocum, 71 N. Y. 345; Haxtun v. Corse, 2 Barb. Ch. 506, 517; Wainwright v. Low, 132 N. Y. 313; McArthur v. Gordon, 126 N. Y. 597, 610; Denike v. Harris, 84 N. Y. 89, 94; Heermans v. Burt, 78 N. Y. 259; Chaplin, Express Trusts and Powers, pp. 27-67.

² A trust of this class can only exist for the benefit of minors. *Infra*, § 214.

³ Real Prop. L., § 91.

Essential elements of express trusts. Brown v. Spohr, 180 N. Y. 201, 209; Greene v. Greene, 125 N. Y. 506, 510; Rose v. Hatch, 125 N. Y.

§ 169. "Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees;¹ but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power,² shall be valid as a power in trust,³ subject to the provisions of this chapter.

* * *." ⁴ But a fully constituted express trust cannot

427, 431; *Sherwood v. American Bible Society*, 4 Abb. Ct. Ap. Dec. 227; *Underwood v. Curtis*, 127 N. Y. 523, 538; *Hickok v. Bunting*, 67 App. Div. 560; *Matter of Dewey*, 153 N. Y. 63, 66; *Close v. Farmers' L. & T. Co.*, 195 N. Y. 92, 99; *Steinhardt v. Cunningham*, 130 N. Y. 292, 300; *McDougall v. Dixon*, 19 App. Div. 420; *Kirk v. Kirk*, 137 N. Y. 510; *Putnam v. Lincoln Safe Deposit Co.* 191 N. Y. 157, 182; *Higgins v. Downs*, 101 App. Div. 119; *Mee v. Gordon*, 187 N. Y. 400, 407. Compare *Williams v. Boul*, 101 App. Div. 593, aff'd 184 N. Y. 605; *Hopkins v. Kent*, 145 N. Y. 363; *Cochrane v. Schell*, 140 N. Y. 516, 527; *Chaplin, Express Trusts & Powers*, pp. 51-67.

Non-essentials. *Woodward v. James*, 115 N. Y. 346; *Tobias v. Ketchum*, 32 N. Y. 319, 327; *Ward v. Ward*, 105 N. Y. 68, 73; *Hathaway v. Hathaway*, 37 Hun, 265; *Vernon v. Vernon*, 53 N. Y. 351; *Donovan v. Van DeMark*, 78 N. Y. 244; *Toronto G. T. Co. v. C. B. & Q. R. R. Co.*, 123 N. Y. 37, 44; *Cochrane v. Schell*, 140 N. Y. 516; *Robert v. Corning*, 89 N. Y. 225, 236; *Marx v. McGlynn*, 88 N. Y. 357, 375; *Morse v. Morse*, 85 N. Y. 53, 60; *Leggett v. Perkins*, 2 N. Y. 297, 305; *Weeks v. Cornwell*, 104 N. Y. 325; *DeKay v. Irving*, 5 Den. 646, 651; *Dillaye v. Greenough*, 45 N. Y. 438, 444; *Manice v. Manice*, 43 N. Y. 303, 363; *Mee v. Gordon*, 187 N. Y. 400, 407; *Brewster v. Striker*, 2 N. Y. 19, 36; *Beekman v. Bonsor*, 23 N. Y. 298, 314; *Verdin v. Slocum*, 71 N. Y. 345; *Van Cott v. Prentice*, 104 N. Y. 45; *Wetmore v. Truslow*, 51 N. Y. 338; *Chaplin, Express Trusts & Powers*, pp. 23-27.

¹ *Morse v. Morse*, 85 N. Y. 53, 60; *Cooke v. Platt*, 98 N. Y. 35; *Adams v. Perry*, 43 N. Y. 487; *Hagerty v. Hagerty*, 9 Hun, 175.

² See *Tilden v. Green*, 130 N. Y. 29, 53; *Steinhardt v. Cunningham*, 130 N. Y. 292, 300.

³ N. Y. *Dry Dock Co. v. Stillman*, 30 N. Y. 174, 190; *Hawley v. James*, 16 Wend. 61, 174-5; *Close v. Farmers' L. & T. Co.*, 195 N. Y. 92, 99.

⁴ *Real Prop. L. § 99*; *Steinhardt v. Cunningham*, 130 N. Y. 292, 300; *Holly v. Hirsch*, 135 N. Y. 590; *Haug v. Schumacher*, 166 N. Y. 506, 517-8; *Kernochan v. Marshall*, 165 N. Y. 472, 479; *Greenland v. Waddell*, 116 N. Y. 234; *Manice v. Manice*, 43 N. Y. 303, 364; *Downing v. Marshall*, 23 N. Y. 366, 379; *Reynolds v. Denslow*, 80 Hun, 359 (see *Mullins v. Mullins*, 79 Hun, 421); *Belmont v. O'Brien*, 12 N. Y. 394, 403; *Robert*

be sustained as a power merely for the sole purpose of rendering valid a scheme which would otherwise be void as effecting an illegal suspension.¹

§ 170. If, on the other hand, the attempted trust is passive, the legal title follows the beneficial interest, free even from a power.²

§ 171. The statute concerning suspension of the power of alienation cannot be evaded by a direct devise accompanied by a secret trust, though the fact that it is not openly expressed may necessitate a different form of proceeding to determine the facts and apply the remedy.³

v. Corning, 89 N. Y. 225, 237; Heermans v. Robertson, 64 N. Y. 332, 342; Marvin v. Smith, 46 N. Y. 571, 575; Weeks v. Cornwell, 104 N. Y. 325; Ward v. Ward, 105 N. Y. 68, 73; Jacoby v. Jacoby, 188 N. Y. 124.

¹ Fargo v. Squiers, 154 N. Y. 250, 260; Gano v. McCann, 56 How. Pr. 337.

² Real Prop. L., §§ 92, 93; Wendt v. Walsh, 164 N. Y. 154; Burns v. Allen, 89 Hun, 552, aff'd 154 N. Y. 741; Syracuse Savings Bank v. Holden, 105 N. Y. 415; Fisher v. Hall, 41 N. Y. 416; Kiah v. Grenier, 56 N. Y. 220, 225; Close v. Farmers' L. & T. Co., 195 N. Y. 92; Hagerty v. Hagerty, 9 Hun, 175; Gilman v. McArdle, 99 N. Y. 451, 456; Everitt v. Everitt, 29 N. Y. 39, 71; Woodgate v. Fleet, 64 N. Y. 566, 573; Helck v. Reinheimer, 105 N. Y. 470, 475. See Post v. Hover, 35 N. Y. 593, 597; Killam v. Allen, 52 Barb. 605; Morgan v. Masterton, 4 Sandf. 442, 449. Compare Matter of De Reycke, 99 App. Div. 596, and Guental v. Guental, 113 App. Div. 310; Townshend v. Frommer, 125 N. Y. 446; Moore v. Appleby, 36 Hun, 368, aff'd 108 N. Y. 237; Matter of Livingston, 34 N. Y. 555, 567; N. Y. Dry Dock Co. v. Stillman, 30 N. Y. 174, 193. Implied, and resulting trusts. Real Prop. L., § 93; Clark v. Clark, 147 N. Y. 639; Johnston v. Hughes, 187 N. Y. 446; Jacoby v. Jacoby, 188 N. Y. 124; Smith v. Edwards, 88 N. Y. 92, 102; Schierloh v. Schierloh, 148 N. Y. 103; Darrow v. Calkins, 154 N. Y. 503, 517. Trusts for married women. Domestic Relations Law, § 59; Genet v. Hunt, 113 N. Y. 158, 172. Precatory words. Clay v. Wood, 153 N. Y. 134; Matter of Gardner, 140 N. Y. 122, 128; Willets v. Willets, 20 Abb. N. C. 471; 35 Hun, 401, rev'd 103 N. Y. 650.

³ O'Hara v. Dudley, 95 N. Y. 403; Matter of Kelemen, 126 N. Y. 73; Booth v. Baptist Church, 126 N. Y. 215; Matter of Ingersoll, 131 N. Y. 573; Forster v. Winfield, 142 N. Y. 327, 333; Amherst College v. Ritch, 151 N. Y. 282, 323; Curtis v. Moore, 152 N. Y. 159; Edson v. Bartow, 154 N. Y. 199, 219.

§ 172. Now, of the four authorized classes of express trust, two are such that by themselves alone, they cannot occasion suspension of the power of alienation, and two are such that by themselves alone they must occasion such suspension. Before discussing this classification further, it will be convenient to state briefly the relation of the trustee and the beneficiary to one another, and to the estate and interests involved.

The Trustee and the Beneficiary.

§ 173. By § 105 of the Real Property Law, it is provided that "If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall be absolutely void. . . ." ¹ And § 103 of the Real Property Law, provides that "The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred." ²

¹ The section referred to proceeds to provide for mortgages, sales, purchases or exchanges under certain conditions, with the approval of the court. Leases are dealt with in Real Prop. L., § 106. See also Id. § 107. *Matter of Clarke*, 59 Hun, 557, 128 N. Y. 658; *Matter of Roe*, 119 N. Y. 509.

The fact that the court may thus authorize the trustee to sell, mortgage or exchange, as by Real Property Law, § 105, does not obviate any suspension otherwise existing, for several reasons: for (1) the court is not a "person" in the sense of the statute relating to suspension; (2) the granting of its consent is not in any sense participation in a conveyance, but a condition precedent to any conveyance; (3) the court cannot grant it at its option, but only in case it finds that certain facts exist; (4) the estate or fund would still remain subject to the same trust, notwithstanding the shift in the identity of its physical make-up. All these points have been considered in Chapter II.

² This does not apply to trusts created prior to the original enactment

§ 174. Thus, under the first of these statutory provisions, there are trusts such that a conveyance would be in contravention of them, and as, in those cases, the trustee, who holds the legal title, cannot convey, the absolute power of alienation is suspended. This constitutes the particular reason why certain trusts occasion suspension. But in addition, the second of the statutory provisions just quoted renders it impossible for the beneficiary of certain trusts to transfer his rights, and thus makes it, for reasons elsewhere considered, appropriate to say, as the courts have often said, that this provision may also co-operate in occasioning suspension of the power of alienation. In order to more fully set forth the various estates and interests under consideration, the following propositions should here be stated.

§ 175. The Real Property Law, § 100, provides that "except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."¹ The corresponding section of the Revised Statutes,² provided that such a trust "shall vest the whole estate in the trustee, in law and in equity, subject," etc. It has, therefore, often been laid down that the trustee takes the entire legal estate;³ and also the entire equitable

of the statute. *Dyett v. C. T. Co.*, 140 N. Y. 54. As to personal property, see Chapter VII.

¹ *Steinhardt v. Cunningham*, 130 N. Y. 292, 300; *Cochrane v. Schell*, 140 N. Y. 516; *Kernochan v. Marshall*, 165 N. Y. 472; *Hascall v. King*, 162 N. Y. 134.

² 1 R. S. 729, § 60.

³ *Van Cott v. Prentice*, 104 N. Y. 45, 52-3; *Marx v. McGlynn*, 88 N. Y. 357, 376; *Asche v. Asche*, 113 N. Y. 232, 235; *Amory v. Lord*, 9 N. Y. 403, 410; *Douglas v. Cruger*, 80 N. Y. 15, 18; *Lahey v. Kortright*, 132

title,¹ and becomes for all purposes of full and untrammelled control and direction, the exclusive owner of the land.²

§ 176. But even under the provision of the Revised Statutes above quoted, conferring upon the trustee, "the whole estate," "in law and in equity," as well as under the provision of the Real Property Law which confers "the legal estate," the statute only refers to the trust estate itself, including whatever legal estate is necessary for the due performance of the trust purposes. For by Real Prop. L., § 101,³ it is provided that "The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under them." Thus the "whole estate," or "legal estate," which vests in the trustee, does not interfere with the creation or reservation of estates or interests not embraced in the trust.⁴

N. Y. 450; *Kernochan v. Marshall*, 165 N. Y. 472, 479; *Scott v. West*, 63 Wis. 529, 562. As to devises to aliens as trustees, see *Howard v. Moot*, 64 N. Y. 262, and the index, under Aliens.

¹ Cases above cited.

² *Marx v. McGlynn*, 88 N. Y. 357, 376; *Asche v. Asche*, 113 N. Y. 232, 235.

³ 1 R. S. 721, § 69.

⁴ *Embury v. Sheldon*, 68 N. Y. 227, 235; *Douglas v. Cruger*, 80 N. Y. 15; *Stevenson v. Lesley*, 70 N. Y. 512, 517; *Genet v. Hunt*, 113 N. Y. 158, 169, 172-3; *Gilman v. Reddington*, 24 N. Y. 9, 15, 16; *Goebel v. Wolf*, 113 N. Y. 405; *Matter of Brown*, 154 N. Y. 313, 325; *Brown v. Richter*, 25 App. Div. 239; *Rhodes v. Caswell*, 41 App. Div. 229; *Losey v. Stanley*, 147 N. Y. 560, 568; *Campbell v. Stokes*, 142 N. Y. 23 (which comments on the case of *Townshend v. Frommer*, 125 N. Y. 446); *Locke v. F. L. & T. Co.*, 140 N. Y. 135, 146; *Knowlton v. Atkins*, 134 N. Y. 313;

§ 177. The existence of a valid express trust is consistent with the contemporaneous existence of a legal estate in remainder in the beneficiary, limited on the trust estate, and descendible, devisable and alienable, although he has no title to the precedent estate in the trustee.¹ The present beneficial interest and the future title in remainder in the same person, do not merge.² And so there may be such a remainder limited to some person other than the beneficiary.³ And by Real Prop. L., § 102,⁴ it is further provided that "Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs."⁵ And even though the precedent estate is held in trust for the lives of the same persons in whom a future estate thus vests through intestacy, the existence of the prior trust does not interfere with the beneficial vesting of the future estate.⁶

§ 178. And instead of either in terms directly limiting a remainder, or making no disposition whatever of the expectant estate, the creator of the trust may direct

Hopkins v. Kent, 145 N. Y. 363; Matter of Tienken, 131 N. Y. 391; Matter of Tompkins, 154 N. Y. 634, 644. See Toms v. Williams, 41 Mich. 552, 566; Van Camp v. Fowler, 59 Hun, 311; Nicoll v. Walworth, 4 Den. 385; Norton v. Norton, 2 Sandf. 296.

¹ Crooke v. County of Kings, 97 N. Y. 421, 434; Mott v. Ackerman, 92 N. Y. 539; Vanderpoel v. Loew, 112 N. Y. 167; Van Brunt v. Van Brunt, 111 N. Y. 178, 187; Moore v. Appleby, 36 Hun, 368, aff'd 108 N. Y. 237; Embury v. Sheldon, 68 N. Y. 227, 234; Stevenson v. Lesley, 70 N. Y. 512, 516; Asche v. Asche, 113 N. Y. 232; Connolly v. Connolly, 122 App. Div. 492, 495; Van Axte v. Fisher, 117 N. Y. 401.

² Id. And so in personal property. Warner v. Durant, 76 N. Y. 133; Van Brunt v. Van Brunt, 111 N. Y. 178.

³ Nicoll v. Walworth, 4 Den. 385; Bergmann v. Lord, 194 N. Y. 70, 75. 41 R. S. 729, § 62.

⁵ Loughheed v. D. B. Church, 129 N. Y. 211; Van Nostrand v. Marvin, 16 App. Div. 28; 161 N. Y. 650.

⁶ Doane v. Mercantile Trust Co., 160 N. Y. 494; Bergmann v. Lord, 194 N. Y. 70, 76. As to personal property, see Chapter VII.

the trustees, at the termination of the trust estate, to convey the fee, either to designated persons, or to persons who shall then answer to a given description, or to persons hereafter to be designated by way of an appointment.¹ And the terms of the instrument and the nature of the trustee's duties may be such as to give him the fee simple, so long as the trust lasts, with no legal remainder whatever in those who are to take upon the termination of the trust.²

§ 179. "A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits,³ shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power."⁴

§ 180. The beneficiary, as such, of an express trust, has under the statutes above quoted, and in the sense indicated, no estate or interest in the land;⁵ his only concern in the matter is to see that the trustee does his

¹ Chapter V.

² *Salisbury v. Slade*, 160 N. Y. 278; *Bennett v. Garlock*, 79 N. Y. 302. (See also the dissenting opinion of *Rapallo, J.*, p. 322.) *Briggs v. Davis*, 21 N. Y. 574; *Duvall v. English Ev. L. Church of St. James*, 53 N. Y. 500; *Brennan v. Willson*, 71 N. Y. 502; *Knox v. Metropolitan El. Ry. Co.*, 58 Hun, 517, 520, *aff'd* 128 N. Y. 625.

³ See *Cooke v. Platt*, 98 N. Y. 35, 39; *Heermans v. Burt*, 78 N. Y. 259.

⁴ *Real Prop. L.*, § 97; *Matter of Christie*, 59 Hun, 153, 156, *aff'd* as *Matter of Will of Butterfield*, 133 N. Y. 473; *Weeks v. Cornwell*, 104 N. Y. 325, 338; *Hubbard v. Housley*, 43 App. Div. 129; 160 N. Y. 688. Although this statute refers only to devises, it is stated in *Steinhardt v. Cunningham*, 130 N. Y. 292, 299, that the same rule also applies to grants. But see *Heermans v. Robertson*, 64 N. Y. 332, 342. The creator of the trust may be the trustee. *Locke v. F. L. & T. Co.*, 140 N. Y. 135, 141. The real creator of the trust may be some one other than the person who actually executes the formal trust instrument. See *Culross v. Gibbons*, 130 N. Y. 447, 453, and *Wendt v. Walsh*, 164 N. Y. 154.

⁵ *Real Prop. L.*, § 100.

duty by him, and all he needs, for this purpose, the statute gives him, namely, the right to enforce the performance of the trust.¹ And after a trust deed once takes effect and becomes irrevocable, the fact that the rents are in fact received by the grantor instead of the trustee cannot impair its validity as against the *cestuis que trust*, or affect their rights.²

§ 181. But notwithstanding the technical relations of the trustee and the beneficiary in respect to the actual legal title to the property held in trust, as applied to the estate or term affected, yet after all the trustee has personally no property right in the trust. The property right is in the beneficiary.³

What Trusts Occasion Suspension.

§ 182. Inasmuch, then, as the sole test of suspension of the absolute power of alienation is found in the presence, or absence, of persons in being by whom an absolute fee in possession can be conveyed, it follows that

¹ Id. Indefiniteness of designation of beneficiaries. *Guental v. Guental*, 113 App. Div. 310; *Harrington v. Abberton*, 115 App. Div. 177. Where a grantor evidently intends to create a valid trust, a provision that the beneficiaries shall have no legal or equitable right to principal or interest, will be construed as merely equivalent to the provision of Real Prop. L., § 100, and not as denying the right in the beneficiaries to enforce the trust as against the trustees. *Van Cott v. Prentice*, 104 N. Y. 45, 52-3.

² *Wallace v. Berdell*, 97 N. Y. 13, 25. For the bearing and scope of the proposition that "the same person cannot be at the same time trustee and beneficiary of the same identical interest," see *Weeks v. Frankel*, 197 N. Y. 304; *Woodward v. James*, 115 N. Y. 346, 357; *Rose v. Hatch*, 125 N. Y. 427, 431-2; *Robertson v. de Brulatour*, 188 N. Y. 301; *Rogers v. Rogers*, 111 N. Y. 228, 237 *et seq.*; *Bender v. Paulus*, 197 N. Y. 369; *Greene v. Greene*, 125 N. Y. 506, 510; *Losey v. Stanley*, 147 N. Y. 560, 568; *Rankine v. Metzger*, 69 App. Div. 264, 269, *aff'd* 174 N. Y. 540; *Matter of Farrell*, 133 App. Div. 97, *aff'd* 198 N. Y. 579; *Austin v. Oakes*, 117 N. Y. 577; *Amory v. Lord*, 9 N. Y. 403, 412; *Haendle v. Stewart*, 84 App. Div. 275.

³ *Brearely School v. Ward*, 201 N. Y. 358, 371; *Metcalf v. Union Trust Co.*, 181 N. Y. 39.

the distinction between trusts which do, and those which do not, occasion suspension, is identical with that between trusts which do, and those which do not, operate to incapacitate the persons who might otherwise effect such a conveyance. So far as concerns suspension occasioned by express trusts, the persons who might convey the title, or transfer the beneficial rights, if not thus incapacitated, are obviously the trustee and the persons beneficially interested. We will first consider the case of the trustee.

§ 183. As already seen, every sale, or conveyance or other act of the trustee of an express trust, *if in contravention of the trust*, is void, except in certain cases here immaterial. If not thus in contravention it would not be void. Accordingly, to find which trusts involve inability to convey, we have only to determine which are such that a conveyance would be in contravention of the trust expressed.¹ Now the mere reading of the section² which defines the four authorized classes of express trusts in real property, shows at once that two of them exist for the express purpose of effecting a conveyance of some estate or interest in the property, and the other two for purposes which, standing alone, are inconsistent with any power to convey.

§ 184. In order to create a trust under subdivisions 1 or 2, of Real Property Law, § 96, the sale or other transfer of interest must be the primary purpose of the grant, and the duty of the grantee must be imperative, without any discretion in the trustee except as to

¹ Belmont v. O'Brien, 12 N. Y. 394; Schreyer v. Schreyer, 101 App. Div. 456, 461, aff'd 182 N. Y. 555; Fitzgerald v. Topping, 48 N. Y. 438, 444; U. S. Trust Co. v. Roche, 116 N. Y. 120, 130; Cruger v. Jones, 18 Barb. 467.

² Real Prop. L. § 96.

the time and manner of performing that duty.¹ These two classes comprise trusts to *effect* alienation, and not to suspend the power of alienation.² A trust which will operate to suspend the power of alienation cannot be created under these two classes.³ But though a trust of the first or second class cannot, considered merely as such, and by itself alone, effect suspension, yet if a trust to sell is not to be exercised until a future date, and then for the benefit of a trustee of another trust which is of such a character that its trustee cannot release or assign, a suspension will result.⁴

§ 185. On the other hand, under the third and the fourth of the four classes of express trusts authorized by Real Property Law, § 96 (subd. 3 and 4), being those to *receive and apply* rents and profits of real property, and those to *receive and accumulate* rents and profits of real property, a sale by the trustee would, so far as concerns the mere trust itself, and apart from some other power specially conferred, be in contravention of the trust and therefore void.⁵ This inability to convey (except as specifically authorized either for the purpose of changing the form of the trust property or of terminating the trust in whole or in part) is of the very essence and purpose of those two trusts. A trust created under either of these two classes, for the general receipt and application, or the general receipt and accumulation, of rents and profits, necessarily, therefore, effects a suspension of the absolute power of

¹ *Woerz v. Rademacher*, 120 N. Y. 62; *Heermans v. Burt*, 78 N. Y. 259. A discretionary power of sale will not suffice. *Steinhardt v. Cunningham*, 130 N. Y. 292, 300; *Cooke v. Platt*, 98 N. Y. 35, 38, 39. See *Henderson v. Henderson*, 113 N. Y. 1, 11.

² *Cochrane v. Schell*, 140 N. Y. 516; *Steinhardt v. Cunningham*, 130 N. Y. 292, 300.

³ *Hascall v. King*, 162 N. Y. 134.

⁴ *Garvey v. McDevitt*, 72 N. Y. 556.

⁵ Real Prop. L. § 105.

alienation,¹ unless the instrument also creates a separate trust or power for alienation, a subject discussed, *infra*, §§ 241-242.

§ 186. We will now consider the bearing, upon suspension of the power of alienation, of restrictions imposed by statute on the power of the beneficiary to transfer his rights. And in this connection, it should be noticed that we are here dealing with suspension of the power to alienate real property, and as the beneficiary, as such, does not hold the legal title, he could not of course, merely by virtue of his status as beneficiary, convey it, and thus in a certain sense it may correctly be said that it is not the restriction imposed on his power to transfer his interests, but the restriction imposed on the power of the trustee, the holder of the title, to convey, that occasions suspension of the power of alienation. Nevertheless there is another sense in which the restriction on the power of the beneficiary to transfer does co-operate in occasioning suspension. For the restriction is such as to render it impossible for the

¹ *Douglas v. Cruger*, 80 N. Y. 15; *U. S. Trust Co. v. Roche*, 116 N. Y. 120, 130; *Cruger v. Jones*, 18 Barb. 467; *Wetmore v. Porter*, 92 N. Y. 76; *L'Armoureaux v. Van Rensselaer*, 1 Barb. Ch. 34, 37; *Fitzgerald v. Topping*, 48 N. Y. 438, 444; *Everitt v. Everitt*, 29 N. Y. 39, 90; *Lewisohn v. Henry*, 179 N. Y. 352; *Kalish v. Kalish*, 166 N. Y. 368; *Slater v. Slater*, 114 App. Div. 160, *aff'd* 188 N. Y. 633; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86; *Brown v. Quintard*, 177 N. Y. 75; *Murphy v. Whitney*, 140 N. Y. 541, 546; *Matter of Kirby*, 113 App. Div. 705; *Radley v. Kuhn*, 97 N. Y. 26, 34; *Robert v. Corning*, 89 N. Y. 225, 235; *Smith v. Edwards*, 88 N. Y. 92, 102; *Leonard v. Burr*, 18 N. Y. 96, 107; *Kahn v. Tierney*, 135 App. Div. 897, 201 N. Y. 516; *Frazer v. Hoguet*, 65 App. Div. 192; *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266, 278; *Crooke v. County of Kings*, 97 N. Y. 421; *Woodridge v. Bockes*, 59 App. Div. 503, *aff'd* 170 N. Y. 596. Suspension may be occasioned by trusts limited to begin in future, as well as by present trust estates. *Manice v. Manice*, 43 N. Y. 303, 365; *Mason v. Mason's Executors*, 2 Sandf. Ch. 432, 474, *aff'd* 2 Barb. 229; *Garvey v. McDevitt*, 72 N. Y. 556; *Peck v. Sherwood*, 56 N. Y. 615; *Webster v. Morris*, 66 Wis. 364; *Doscher v. Wyckoff*, 132 App. Div. 139.

beneficiary, by assigning his rights, to end the purpose of the trust, and thus its existence, and thereby effectuate the vesting of an absolute title. From that point of view the statutory prohibition on such transfers is a factor in effecting the suspension of the power of alienation.¹ So again, not as a matter of logical necessity, but as a matter of fact, as our law now stands any trust whose beneficiary is under no statutory inability to effectuate the transfer of his beneficial rights, is also a trust whose trustee is under no statutory inability to convey. The two respective capacities, to transfer beneficial rights and to convey the legal title, usually go together.² It is here appropriate, therefore, to consider the law governing the subject of the beneficiary's right to transfer his interests.

§ 187. Under the Revised Statutes, 1 R. S. 730, § 63, it was provided that "No person beneficially interested in a trust for the *receipt of the rents and profits* of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the *payment of a sum in gross* is created, are assignable." Under that statute, the rights of a beneficiary under a trust of the first or second classes of trusts,³ could be assigned, and those of a beneficiary under a trust of the third or fourth classes,⁴ could not be assigned,⁵ except possibly in certain peculiar cases where the payment of a "sum in gross," instead of the payment or accumulation of rents in general, was involved.⁶ Under the Real Property

¹ *Hawley v. James*, 16 Wend. 61, 165-6.

² See, however, the new statute relating to certain personal property trusts, *infra*, § 399.

³ Real Prop. L., § 96, Subd. 1 and 2.

⁴ Real Prop. L., § 96, subd. 3 and 4.

⁵ *Matter of Kirby*, 113 N. Y. 705.

⁶ *Radley v. Kuhn*, 97 N. Y. 26.

Law, § 103, it is provided that "The right of a beneficiary of an express trust *to receive* rents and profits of real property *and apply them* to the use of any person, cannot be transferred by assignment or otherwise, but the right and interest of the beneficiary of *any other* trust in real property may be transferred."¹

§ 188. Inasmuch as it is now settled,² that the first and second classes of express trusts are not trusts for the receipt of rents and profits by the trustee, it is clear that under either of the statutes last above quoted the rights of the beneficiaries thereunder can be assigned.³ It is also clear that under a trust of the third class, to receive rents and profits and apply them to the use of any person, the rights of the beneficiary, at least so far as the trust merely provides for the application of rents and profits generally,⁴ are not assignable.⁵ So the mere fact that the trustee of an express trust is given a power of sale such as to obviate suspension of the power of alienation as to the real property does not render assignable the interest of the beneficiary.⁶

§ 189. In regard, however, to trusts of the fourth class, to receive rents and profits and (instead of applying them, in the ordinary sense) accumulate them for the benefit of a minor, attention should be called to certain peculiarities in the phraseology of § 103 of the statute, above quoted, relating to transferability of beneficial right. The distinction it draws, is that between "trusts *to receive* the rents and profits of real

¹ For the new statutory provision on this subject in relation to personal property, see § 399.

² See §§ 199-204.

³ *Radley v. Kuhn*, 97 N. Y. 26.

⁴ *Radley v. Kuhn*, 97 N. Y. 26, 31.

⁵ *Douglas v. Cruger*, 80 N. Y. 15, 18.

⁶ *Robert v. Corning*, 89 N. Y. 225, 236.

property *and apply them* to the use of any person" (a phrase quoted bodily from the definition of express trusts of the third class),¹ and "any other trust in real property." Thus, taking the words literally, it would appear² that the prohibition in § 103 applied only to express trusts of the third class, and not to those of the fourth class. It is believed, nevertheless, that under the statute last quoted, transfers of interest by beneficiaries are still as fully prohibited in the case of trusts to receive and accumulate rents and profits generally, as in the case of trusts to receive and apply rents and profits generally, and for the following reasons.

§ 190. (a) The Revised Statutes in the section 1 R. S. 730, § 63, corresponding to Real Property L., § 103, above quoted, provided that "no person beneficially interested in a trust for the *receipt* of the rents and profits of lands, can assign," etc. That section obviously covered both subdivision 3 and subdivision 4 of the section defining the four classes of trusts, each of which began, as do the present corresponding subdivisions with the words "To receive the rents and profits." And it was in fact settled that the prohibition of 1 R. S. 730, § 63 applied to both of those subdivisions where the trust contemplated either a general receipt and application in the one case, or a general receipt and accumulation in the other.³ Now the Commissioners of Revision state that their section now numbered 103, as phrased by them, is "unchanged in substance."

§ 191. (b) The reference in § 103 to "trusts to receive and apply," while certainly employing a somewhat obscure term to cover trusts for accumulation,

¹ Real Prop. L., § 96, subd. 3.

² See Consolidators' Note to the section.

³ Radley v. Kuhn, 97 N. Y. 31.

can be understood in that sense, for the rents received and accumulated are currently set aside for the use of the beneficiary, and in the final result are to be paid over to him; and the statutory term "apply" has been held to be satisfied by a direction to "pay,"¹ and a trust to pay over rents or income quarterly, or annually, is a trust to apply the same, and the beneficiary's interest is not assignable.²

§ 192. (c) The statute, if so construed as to permit assignment, would become inconsistent in its several parts, for it would confer a power upon a minor, directly or through his representative, for whom an accumulation is directed, which it withholds from all beneficiaries of trusts to receive and apply rents and profits, even though they may be, and often are, adults possessed of discretion and business ability.

§ 193. (d) It is also inconsistent with the inherent nature of a trust to accumulate generally, that the interest of the beneficiary should be transferable. For such a trust can only be created for the benefit of a minor, and not for any other person or purpose.³ But if the minor's interest could be validly assigned, and still continue to exist, the result would follow that the trust, which would be void if not created for the sole benefit of a designated minor, could if once so created be continued, if at all, for the benefit of any person whatsoever to whom the minor, or his representative, might transfer his right. In fact, therefore, the result of an assignment, if allowable pending the term, would apparently be to terminate the trust, and as in that

¹ *Cochrane v. Schell*, 140 N. Y. 516, 532.

² *Matter of Ungrich*, 201 N. Y. 415, 419; *Cochrane v. Schell*, 140 N. Y. 556.

³ *Real Prop. L.*, § 61; *Hascall v. King*, 162 N. Y. 134.

event the beneficiary would thus be able to divest the trustee's title, and thereby vest an absolute fee elsewhere, a trust for accumulation would never occasion a suspension.

§ 194. (e) It is indeed true that inalienability, in the case of an express trust, arises directly not from the fact that a beneficiary cannot transfer his interest, but from the prohibition against alienation by the trustee, as holder of the legal title. But in the present connection that fact is unimportant. For if the beneficiary of such a trust could assign his interest, terminate the trust, and divest the trustee's title, it would only amount to saying that although the statute renders the title non-alienable by the trustee, the beneficiary may in effect render the statutory prohibition futile.

§ 195. (f) If the interest of a beneficiary of a trust for accumulation generally could be assigned, it would present the anomaly of being wholly assignable by the beneficiary, and yet not capable of being reached by his creditors,¹ in such cases of otherwise enforceable claims as might exist against an infant.²

§ 196. (g) If it were true that the beneficiary of a trust for accumulation generally could assign his interest thereunder, it would be unnecessary to provide by statute, as in Real Property Law, § 62,³ that the Court, if the minor is entitled to the expectant estate, and is destitute of sufficient means of support and education, may, upon the application of the guardian, direct a

¹ See *Bergmann v. Lord*, 194 N. Y. 70, 75; *Ullman v. Cameron*, 186 N. Y. 339, 346; *Palmer v. Hallock*, 94 App. Div. 485. See *supra*, § 62, note.

² Except to such extent, if any, as might be affected, in a given case, if Code Civ. Pro. § 1391, should be held applicable. See, however, *Brearley School v. Ward*, 201 N. Y. 358, 362.

³ Similar provisions are found in Pers. Prop. L., § 17.

suitable sum out of the rents and profits directed to be accumulated, to be applied to the minor's maintenance or education. It is to be noticed that these statutes only contemplate such application, in cases where certain specified conditions exist. In so far as this qualification exists upon the power of the Court to direct such application, it is hardly to be supposed that the minor himself could effect such application irrespective of whether those conditions existed or not, or could himself, or by his guardian, effect the appropriation of his interest to any desired purposes, even though not for support or education.

§ 197. It may be that the intended meaning of the suggestion that Real Property Law, § 103, does not prohibit a transfer by the beneficiary of a trust to accumulate, is merely that the same prohibition is already adequately provided by some of the other statutes referred to, and therefore was omitted from § 103 as unnecessary. Such a view of the matter, while leaving the law where it was before the change was made, does not seem to be indicated by the Consolidators' note, above referred to.

§ 198. For the foregoing reasons, it is believed that the rights and interests of beneficiaries under express trusts to receive and accumulate rents and profits, are not transferable. It may, therefore, be stated that as the statutes now stand, the two classes of real property trusts under which the beneficiary cannot transfer his rights, are the same as those under which, without special additional authority, the trustee cannot convey the title, and accordingly it is these two that occasion suspension of the absolute power of alienation.

Thus far, we have treated the four classes of express trusts as if the distinction between them was entirely clear cut and precise. In reality, however, questions

have from time to time arisen concerning the proper place, under that classification, for certain particular trusts. This subject will now be considered.

“ Leases ” Under Express Trusts.

§ 199. The first of the four authorized classes of express trusts, namely that covering trusts to sell real property for the benefit of creditors, does not, when considered by itself alone, warrant any authority to the trustee to lease the real property. But under each of the other three classes, express trusts conferring upon the trustee authority to lease, may be created. The second of these (subdivision 2), to sell, mortgage or lease, permits such authority in express statutory terms, and under each of the other two trusts, to receive and apply rents and profits, or to receive and accumulate rents and profits, the right to confer authority to lease is necessarily involved, in order that there may be rents and profits to receive.¹ And such authority is implied, where necessary, even though not expressly conferred. The exact nature and relation of these statutory authorizations to lease, one expressed and the other two implied, has been the subject of much discussion. In particular, two important questions have received detailed consideration. These are as follows: First, whether an *annuity* to be periodically paid by the trustee from rentals currently received by him from a lease of the real property, executed by him, could be validly provided for under a trust of the second class, “ to sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; ”² and Second,

¹ *Corse v. Corse*, 144 N. Y. 569.

² The words “ annuitants or other, ” were not found in the earlier statute, 1 R. S. 728, § 55, but were added by the Real Property Law.

whether the satisfaction of an indebtedness secured by mortgage on real property, to be paid off by the trustee from like rentals currently received by him, could be validity provided for under a trust of that same class.

§ 200. The solution of each of these problems depends, at least in part, upon the proper meaning to be attributed to the word “lease” in the definition of the second class of trusts. For if that class involves an authority in the trustee to “lease” the property in the technical sense of the term, on the basis of a current rental payable periodically by the tenant to the trustee, that fact would support the theory that he might properly be directed to apply the same to the periodical payment of an annuity, because an annuitant is a legatee, and the payment of legacies is mentioned in the statute as one of the purposes of the trust to lease, and under the present statute annuities are also explicitly referred to; and it would also tend to support the theory that the trustee might properly be directed to use such current rents for the payment of loans secured by mortgage, because the satisfaction of any charge on the land is also mentioned in the statute as one of the purposes of the trust to lease. But if, on the contrary, the term “lease,” in the statute in question, does not refer to a lease in the technical sense, and does not authorize the trustee to lease the property on the basis of a current rental payable by the tenant to the trustee, then it is obvious that a trust for the current application by the trustee of rentals currently received by him under a lease executed by him, to the periodical payment of annuities, or to the satisfaction of an indebtedness secured by mortgage on the land, cannot be created under subdivision 2 of § 96. It happens that the most elaborate discussion and the most complete disposition

of the general question stated, is to be found in a case¹ relating directly to the subject of trusts to lease for the purpose of paying off a mortgage, and accordingly that subject will be first considered, and then the reasoning of the opinion of the court on that point will be applied to the case of a trust to lease for the purpose of paying an annuity.

Trust to Satisfy Mortgage from Rents.

§ 201. If a trustee could be directed to receive the rents and profits of real property held by him in trust, under any of the classes of express trusts, and therefrom pay off a mortgage on real property, the first point to be noticed is that an accumulation would result, for the net value of the corpus would be constantly increasing as the mortgage was paid off from rentals. But this, so far at any rate as concerns the first three classes of express trusts, is not, in itself, one of the purposes for which accumulations are allowed by Real Property Law, § 61,² which authorizes accumulations solely for the benefit of minors, and which also provides that all directions for the accumulation of the rents and profits of real property, except such as are "allowed by statute," shall be void. In *Hascall v. King*,³ it was, however, claimed that such an accumulation, involved in the satisfaction of a mortgage, by using rentals to pay it off, is "allowed by statute," because subdivision 2 of Real Property Law, § 96, ex-

¹ *Hascall v. King*, 162 N. Y. 134.

² *Hafner v. Hafner*, 62 App. Div. 316, aff'd 171 N. Y. 633; *Hascall v. King*, 162 N. Y. 134; *Matter of Jenkins*, 132 App. Div. 339; *Matter of Hoyt*, 71 Hun, 13; *Cowen v. Rinaldo*, 82 Hun, 479. See also *Dresser v. Travis*, 39 Misc. 358, aff'd 87 App. Div. 632; *McComb v. Title Guarantee & Trust Co.*, 36 Misc. 370, aff'd 70 App. Div. 618; *Herzig v. Herzig*, 140 App. Div. 514.

³ 162 N. Y. 134.

pressly provides for a trust "to *lease* real property * * * for the purpose of satisfying any charge thereon." But the court disposed of that argument by holding that the "lease" there referred to is not a lease involving the current receipt of rental by the trustee, but a lease in the nature of an alienation of the estate for a term, in consideration of a lump sum payment to the trustee, or of some other form of payment not involving the receipt by the trustee of current rental.¹

§ 202. This conclusion is derived in part from the fact that the opposite view would permit an accumulation in a form, and for a purpose not contemplated by § 61; and in part from the fact that while subdivisions 3 and 4 of Real Property Law, § 96, specifically authorize the trustee "to receive rents and profits of real property," that authorization is absent in subdivisions 1 and 2, thus indicating the legislative intent that subdivisions 1 and 2 should relate to trusts to *effect* alienation, while subdivisions 3 and 4 should relate to trusts to *prevent* alienation, a distinction which obviously exists so far as applied to trusts to sell, or to mortgage. The same distinction is indicated in Real Property Law, § 103, between trusts "to receive rents and profits of real property and apply them to the use of any person" (including trusts for accumulation, see § 198, *supra*), and "any other trust."² The trust to lease, being classified with those to sell or mortgage, is to be understood in the same sense.³

§ 203. The authority to "lease," under a trust of the second class, is to be construed solely as set forth by Bronson, J., in *Hawley v. James*,⁴ and by Presiding

¹ Hascall v. King, 162 N. Y. 134.

² See also Real Prop. L., § 97.

³ Hascall v. King, 162 N. Y. 134. See also the following section.

⁴ 16 Wend. 61, 152-155.

Justice Van Brunt, in *Cowen v. Rinaldo*,¹ both of which cases are approved by the Court of Appeals in *Hascall v. King*.² These statements, thus approved, are as follows:

In *Hawley v. James*:

(a) The trustee of a trust of the second class may demise the land directly to the creditor at a nominal rent for a period long enough to satisfy the debt charged on the land (or to the legatee, if it is a case of providing for a legacy);

(b) Or the trustee may lease the land to a third person, *reserving the rent to the legatee or person having the charge*.

And in *Cowen v. Rinaldo*:

(c) Or the trustee may lease the land for a given gross sum which the trustee is to receive for the benefit of legatees, or for the purpose of satisfying a charge on the land.

§ 204. Therefore, as the provision for a "lease" under subdivision 2 of the statute does not warrant a lease by the trustee, in the technical sense, so as to entitle the trustee to receive current rentals, it follows that under that subdivision he cannot be directed to apply such rentals to the satisfaction of a mortgage or to any other purpose; and also, as an application of any current rentals to the satisfaction of a mortgage would necessarily involve an accumulation, it follows on that ground that it is not permissible to direct the trustee of any of the first three classes of express trusts to apply any rentals to the satisfaction of a mortgage, because an accumulation can be effected only under the fourth class. Whether such an application of rentals to the satisfaction of a mortgage might under any circumstances be authorized under the fourth class

¹ 82 Hun, 479, 485.

² 162 N. Y. 134, 148, 149.

itself, as for example in a case where the remainder after the trust, in the property itself, from which the rentals are derived, and upon which the mortgage is a lien, is given absolutely to the infant beneficiary, is a question which has not been decided. But inasmuch as, in case of the death of the infant during minority, the land itself would pass to his heirs as real property, and the accumulations, being personal property, to his next of kin, or, if he had reached the testamentary age as to personal property, and left a will, to his legatees, or, if so validly directed in the original instrument, to some other person, the validity of such an application of accumulations might appear to be at least doubtful, unless worked out on the theory of a continuing lien on the property, retaining the identity, in case of need, of the rents thus invested in satisfying the mortgage, and viewing them as still constituting a distinct fund.¹

Trust to Pay Annuity from Rents.

§ 205. The principles stated in the preceding sections, in so far as they relate to the meaning of the term "lease" as employed in the definition of the second class of trusts, appear to be directly applicable to the case of an attempted trust of that class for the periodical payment of annuities by the trustee from rentals currently received by him under a lease of the real estate executed by him. For inasmuch as the term "lease" under subdivision 2 of the statute, refers only to such leases as may be effected by the trustee on some other basis than that of current rental payable to the trustee, he obviously cannot, as such, be charged with the duty of himself executing a lease such as to provide

¹ For the bearing upon this discussion, of the statute which renders authority to receive rents and profits essential to the validity of devises in trust, see §§ 241-243.

him with current rentals for the periodical payment of annuities.¹ It is true that the court, in the case cited, recognized the force of the argument in favor of construing the term "lease," in subdivision 2, in its technical sense, as a contract for the possession and profits of lands and tenements on the one side and a recompense of rent or other income on the other, and said that "It must be conceded that if there were no other provision of the statute bearing directly or indirectly upon the subject of the receipt of rents and profits of lands and their accumulation than is to be found in subdivision 2, the argument to which I have referred could not well be met."

§ 206. One such "other provision" was however found by the court in the statute relating to accumulations, which would, by itself, have no bearing on the question of a lease under subdivision 2 for the purpose of paying annuities, except that it is to be assumed that if the word "lease" as there used has a specific meaning in one connection it has the same meaning in other connections. But additional "other provisions" were also found in the fact that the authorization to lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon, "is found in a subdivision which is in all other respects (and I think in respect to leasing as well) a provision for alienation, and not for the suspension of the power of alienation," and in the fact that subdivisions 3 and 4 specifically authorize the receipt of rents and profits, while subdivision 2 omits any such specific authorization. These additional "other provisions" thus relied on by the court, apply to leases for the payment of annuities with the same force as to leases for the satisfaction of mortgages.

¹ Hascall v. King, 162 N. Y. 134.

§ 207. Accordingly, the opinion in *Hascall v. King*¹ appears to establish also the proposition that it is not competent, under subdivision 2, to provide for the periodical payment of annuities by the trustee from rents and profits to be currently payable to him as landlord by a tenant under a lease from the trustee. And the conclusion that an express trust to pay annuities generally from rents and profits to be received and applied by the trustee, may, and can only, be provided for under subdivision 3 of § 96, covering trusts to receive and apply rents and profits, is supported by a number of other cases.² Annuities payable generally from rents and profits under a trust of the third class, do not constitute "sums in gross" which, under the phraseology of 1 R. S. 730, § 63, were assignable by the beneficiary, and accordingly they were not assignable by him; and a trust for payment of annuities under the third class, effects a suspension of the power of alienation.³

§ 208. Attention should be called to the case of *Radley v. Kuhn*,⁴ involving a trust to receive rents and pay therefrom a single specified sum to each of two specified minors, at majority. The court say that on either of several theories it could be held that this involved no suspension, and among other things say that it might be regarded as a trust to lease lands for the benefit of legatees. A number of cases involving considera-

¹ 162 N. Y. 134.

² *Cochrane v. Schell*, 140 N. Y. 516; *Brown v. Quintard*, 177 N. Y. 75; *Corse v. Corse*, 144 N. Y. 569; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86; *Robb v. Washington and Jefferson College*, 185 N. Y. 485; *Rothschild v. Roux*, 78 App. Div. 282.

³ *Cochrane v. Schell*, 140 N. Y. 516, 535; *Brown v. Quintard*, 177 N. Y. 75; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86; *Robb v. Washington and Jefferson College*, 185 N. Y. 485; *Rothschild v. Roux*, 78 App. Div. 282.

⁴ 97 N. Y. 27.

tion of the subject here discussed, are cited for reference.¹

§ 209. But it does not follow from the foregoing that annuities cannot also be provided for in still other ways. Even under subdivision 2 of the statute, it is competent to provide for the payment of annuities, not through the receipt of rents and profits by the trustee under a lease made by him, but through the methods enumerated by Judge Bronson and by Presiding Justice Van Brunt, as set forth above. And the fact that this can be done, sufficiently explains the appearance in subdivision 2 of the statute, of the specific reference to annuities, an insertion no doubt intended merely to quiet any question as to the inclusion of annuities within the term "legacies." And the Commissioners of Revision state that this subdivision as thus amended, is "unchanged in substance." Also, annuities may be provided for by a charge upon real or personal property, without the necessity for any trust or power whatever, or may be made payable through a power in trust,² in any of which cases they are transferable by

¹ *Hawley v. James*, 16 Wend. 61, 117, 194 (explained in *Hascall v. King*, 162 N. Y. 134, 149); *Parks v. Parks*, 9 Pai. Ch. 107 and 127 (disapproved in *Hascall v. King*, *supra*); *Cowen v. Rinaldo*, 82 Hun, 479 (approved in *Hascall v. King*, *supra*); *Becker v. Becker*, 13 App. Div. 342 (disapproved in *Hascall v. King*, *supra*); *Lang v. Ropke*, 5 Sandf. 363 and *Griffen v. Ford*, 1 Bosw. 123, 142 (both disapproved in *Cochrane v. Schell*, 140 N. Y. 516, 528-9); *Hunter v. Hunter*, 17 Barb. 25, 92; *Gott v. Cook*, 7 Pai. 521, 535; *McGowan v. McGowan*, 2 Duer, 57; *Johnson v. Cornwall*, 26 Hun-499, *aff'd* 91 N. Y. 660; *Killam v. Allen*, 52 Barb. 605; *DeGraw v. Clason*, 11 Pai. 136; *Bradhurst v. Bradhurst*, 1 Pai. 331, 346; *Clute v. Bool*, 8 Pai. 83 (approved in *Cochrane v. Schell*, 140 N. Y. 516, 529); *Stewart v. McMartin*, 5 Barb. 438; *Coster v. Lorillard*, 14 Wend. 265; *McSorley v. Wilson*, 4 Sandf. Ch. 515 (approved in *Cochrane v. Schell*, 140 N. Y. 516, 531.)

² *Cochrane v. Schell*, 140 N. Y. 516, 532; *Buchanan v. Little*, 154 N. Y. 147; *Robb v. Washington & Jefferson College*, 185 N. Y. 485; *People's Trust Co. v. Flynn*, 188 N. Y. 385; *Kinkele v. Wilson*, 151 N. Y. 269; *Matter of Collins*, 144 N. Y. 522; *Redfield v. Redfield*, 126 N. Y. 466; *Horstman v. Flege*, 172 N. Y. 381; *Dunham v. Deraismes*, 165 N. Y. 65;

the beneficiary,¹ and occasion no suspension.²

§ 210. Although the general subject of the "statutory period" permitted for suspension of the power of alienation was treated in Chapter II, the detailed discussion of such features as relate only to express trusts was deferred, and will now be taken up.

The "Statutory Period" for Trusts to Accumulate Rents.

§ 211. The period during which a suspension of the absolute power of alienation of real property, occasioned by an express trust to receive and accumulate rents and profits, may be limited to continue, is specifically provided for by statute. The statutory provisions are as follows:

§ 212. "An express trust may be created for one or more of the following purposes: * * *

"4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."³

§ 213. "All directions for the accumulation of the

Bliven v. Seymour, 88 N. Y. 469, 479; Gilbert v. Taylor, 148 N. Y. 298; Matthews v. Studley, 17 App. Div. 803, aff'd 161 N. Y. 633; Maurice v. Graham, 8 Pai. 483; Mason v. Jones, 2 Barb. 229, 247, aff'd sec 3 N. Y. 375, and see 2 N. Y. 327-8. As a general rule, the bequest of the annual interest on a specified sum is not to be considered as an annuity, consisting of any annual fixed amount, but merely as a gift of such interest as the specified sum earns, Matter of Dewey, 153 N. Y. 63.

¹ Cases above cited.

² Roosevelt v. Porter, 36 Misc. 441, 447.

Bequest of future annuities with cross-remainders in case of the annuitant's death during a preceding estate, illustrated, Matter of Roosevelt, 143 N. Y. 120. Attention is again directed to the fact that certain decisions appear to recognize the right of a trustee under the second class of trusts to receive rents and profits under certain circumstances and that what is believed to be the true theory of these decisions is discussed in §§ 241-243, *infra*.

³ Real Prop. L., § 96.

rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property, as follows:

"1. If such accumulation be directed to commence *on the creation* of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

"2. If such accumulation be directed to commence at any time *subsequent to the creation* of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provision of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority.

"3. If in either case, hereinbefore provided for, such direction be for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority."¹

§ 214. Every accumulation must be for the sole benefit of an infant;² may be implied as well as expressed,³

¹ Real Prop. L., § 61.

Anticipation of directed accumulations. Id., § 62. Undisposed-of profits, Id., § 63, and *infra* § 244.

² Pray v. Hegeman, 92 N. Y. 508, 513, 516, 517, 519; Barbour v. DeForest, 95 N. Y. 13; Harris v. Clark, 7 N. Y. 242; Manice v. Manice, 43 N. Y. 303; McCormack v. McCormack, 60 How. Pr. 196; Craig v. Craig, 3 Barb. Ch. 76, 92 (compare Titus v. Weeks, 37 Barb. 136); Matter of Hayden, 77 Hun, 219; Boynton v. Hoyt, 1 Den. 53; Cook v. Lowry, 95 N. Y. 103, 107; Hull v. Hull, 24 N. Y. 647; Matter of Rogers, 22 App. Div. 428, 431, *aff'd* 161 N. Y. 108, except where otherwise expressly provided by some statute; e. g. the final paragraphs of Pers. Prop. L., § 16, and of Real Prop. L., § 61, relating to accumulations for charities. See as to Michigan, Toms v. Williams, 41 Mich. 552, 569; Wilson v. Odell, 58 Mich. 533.

³ St. John v. Andrews Institute, 191 N. Y. 254, 278; Cochrane v. Schell,

and is strictly prohibited in any form whatever, except for the purposes and during the period prescribed by statute.¹

§ 215. The beginning, duration and termination of trusts for accumulation, are affected both by the general provisions of Real Prop. L., § 42, under which their term must be measured strictly by two lives in being, except in the one case there provided for relating to a further minority; and by the special provisions of § 61, just quoted. Within these limits they may be directed to commence either on the creation of the estate, or sub-

140 N. Y. 516, 527 (compare *Hendricks v. Hendricks*, 3 App. Div. 604, aff'd 154 N. Y. 751); *Hawley v. James*, 16 Wend. 61, 162; *Phelps' Executor v. Pond*, 23 N. Y. 69, 80; *Gilman v. Healy*, 1 Dem. 404, 407; as to personal property, *Bean v. Bowen*, 47 How. Pr. 306. But see *Horton v. Cantwell*, 108 N. Y. 255; *Manice v. Manice*, 43 N. Y. 303, 384.

¹ *Hafner v. Hafner*, 62 App. Div. 316, aff'd 171 N. Y. 633; *Hascall v. King*, 162 N. Y. 134; *Matter of Hoyt*, 71 Hun, 13; *Cowen v. Rinaldo*, 82 Hun, 479; *Thorn v. de Breteuil*, 179 N. Y. 64; *Matter of Slocum*, 169 N. Y. 153, 159; *McGuire v. McGuire*, 80 App. Div. 63; *Spencer v. Spencer*, 38 App. Div. 403; *Matter of Keogh*, 112 App. Div. 414, aff'd 186 N. Y. 544; *U. S. Trust Co. v. Soher*, 178 N. Y. 442; *Matter of Jenkins*, 132 App. Div. 339; *Dresser v. Travis*, 39 Misc. 358, aff'd 87 App. Div. 632; *McComb v. Title Guarantee and Trust Co.*, 36 Misc. 370, aff'd 70 App. Div. 618; *Matter of Nesmith*, 140 N. Y. 609, 614; N. Y. L. I. & T. Co. v. Kane, 17 App. Div. 542; *Haug v. Schumacher*, 166 N. Y. 506, 516; *Matter of Harteau*, 125 App. Div. 710, appeal dismissed, 196 N. Y. 513. But a direction to add to the principal of the trust estate, royalties on ore to be excavated from the lands held in trust, does not fall within the provision of the statute concerning accumulation of rents. The royalties are equivalent to a price received for portions of the corpus. *Palms v. Palms*, 68 Mich. 355. And it does not constitute accumulation to retain and apply the interest to make good a depletion of the original capital occasioned by an anticipatory payment of a future interest, or by a premium on bonds purchased for investment, or for like purposes, see *Livingston v. Tucker*, 107 N. Y. 549, 552; *Craig v. Craig*, 3 Barb. Ch. 76, 92; *Matter of Stevens*, 187 N. Y. 471 and cases cited; *Matter of Nesmith*, 140 N. Y. 609; *Dexter v. Watson*, 54 Misc. 484. See also *Spencer v. Spencer*, 38 App. Div. 403. A merely incidental void provision for accumulation may be cut out, without disturbing the rest of the scheme. *Endress v. Willey*, 122 App. Div. 110, aff'd 197 N. Y. 541.

sequently. In either event they must commence during the minority of the beneficiaries.¹ In order that they may be directed to commence upon the creation of the estate, under subdivision 1 of § 61, the minor for whose benefit the accumulation is directed must be then in being.² An infant *en ventre sa mere* at the creation of the estate, is to be regarded as a person in being.³ Trusts to commence subsequent to the creation of the estate, under subdivision 2 of § 61, must be directed to commence within the time permitted for the vesting of future estates, and while in that case it is not requisite that the minor should be in being at the creation of the estate,⁴ it is essential, in order that the trust may become operative at the time fixed for its commencement, that the minor shall then be in being.⁵ And an accumulation can never begin prior to the birth of the minor for whose benefit it is directed.⁶

§ 216. The statutory provision that an accumulation of the rents and profits of real property, directed to commence subsequent to the creation of the estate, must commence *within* the time permitted for the vesting of future estates, means that it may commence either during the term of two designated lives in being (and either at or subsequent to the birth of the infant),⁷ or at the end, or immediately upon the termination of two such lives, and then continue through the

¹ U. S. Trust Co. v. Soher, 178 N. Y. 442.

² Cochrane v. Schell, 140 N. Y. 516, 527-8.

³ See § 56, *supra*.

⁴ U. S. Trust Co. v. Soher, 178 N. Y. 442; Mason v. Mason's Ex'rs, 2 Sandf. Ch. 432, aff'd. 2 Barb. 229; Manice v. Manice, 43 N. Y. 303, 376.

⁵ Manice v. Manice, 43 N. Y. 303, 376; Kilpatrick v. Johnson, 15 N. Y. 322, 325.

⁶ U. S. Trust Co. v. Soher, 178 N. Y. 442; Matter of Keogh, 112 App. Div. 414, aff'd 186 N. Y. 544; Manice v. Manice, 43 N. Y. 303, 376; Haxtun v. Corse, 2 Barb. Ch. 506, 518; Kilpatrick v. Johnson, 15 N. Y. 322. Compare Haug v. Schumacher, 166 N. Y. 506, 516.

⁷ Mason v. Mason's Ex'rs, 2 Sandf. Ch. 432, 476-7.

minority of the infant.¹ The fact that for the period of the trust for accumulation, the title is necessarily vested not in the minor but in the trustee, for the minor's benefit, does not interfere with the applicability of Real Property Law, § 42.² When the minor reaches majority the accumulation, irrespective of whether it was directed to commence on or subsequent to the creation of the estate, must cease.³

§ 217. It is not allowable to direct its continuance for a fixed term not measured by minority;⁴ or for a term not measured at all;⁵ or for several lives.⁶ But if the direction is for a longer term than a minority, it is void only for the excess.⁷ Within the limit of the "statutory period," there are opportunities presented for successive accumulations.⁸

§ 218. When the minor reaches majority, the accumulated fund belongs to him.⁹ During minority it vests

¹ *Manice v. Manice*, 43 N. Y. 303.

² *Manice v. Manice*, 43 N. Y. 303, 377, 381.

³ Real Prop. L., § 109 and § 61; *Goebel v. Wolf*, 113 N. Y. 405, 415; *Bryan v. Knickerbacker*, 1 Barb. Ch. 409; *Cook v. Lowry*, 95 N. Y. 103; *Matter of Dey Ermand*, 24 Hun, 1; *McCormack v. McCormack*, 60 How. Pr. 196; *King v. Rundle*, 15 Barb. 139, 145; *Williams v. Williams*, 8 N. Y. 525; *Simpson v. English*, 1 Hun, 559; *Matter of Hoyt*, 32 State Rep. 787; *Kalish v. Kalish*, 166 N. Y. 368, 373; *Matter of Hayden*, 77 Hun, 219; *Tweddell v. N. Y. Life Ins. & Trust Co.*, 82 Hun, 602; see *Haug v. Schumacher*, 166 N. Y. 506, 518.

⁴ *Rice v. Barrett*, 102 N. Y. 161.

⁵ *Yates v. Yates*, 9 Barb. 324.

⁶ *Hobson v. Hale*, 95 N. Y. 588; *Harris v. Clark*, 7 N. Y. 244.

⁷ Real Prop. L., § 61. *Hull v. Hull*, 24 N. Y. 647, 650; *Radley v. Kuhn*, 97 N. Y. 26, 32; *Gilman v. Reddington*, 24 N. Y. 9, 19. See also *Tobin v. Graf*, 39 Misc. 412.

⁸ *Mason v. Mason's Ex'rs*, 2 Sandf. Ch. 432, 475; *Forsyth v. Rathbone*, 34 Barb. 388. See *Ruppert's Estate*, Tucker, 480; *Brown v. Quintard*, 177 N. Y. 75.

⁹ *Tweddell v. N. Y. Life Ins. & Trust Co.*, 82 Hun, 602; *Gilman v. Healy*, 1 Dem. 404; *Pray v. Hegeman*, 92 N. Y. 508; *Barbour v. DeForest*, 95 N. Y. 13; see also *Cochrane v. Alexander*, 56 Misc. 212.

in him as it accrues, subject to the trust during minority, and is not divested by his death under age, but goes to his next of kin as such, except in so far as the trust instrument may have validly provided, that in that case it shall pass to others.¹

§ 219. It seems that there is a limit beyond which the doctrine forbidding accumulations cannot be carried. "We do not suppose that the very day income is received it must be paid over to, or distributed among the beneficiaries, and that no amount can be retained for any time, however short, with which to pay a charge certain to accrue in the immediate future."²

§ 220. In the case of personal property, the statute provides that "an accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid: 1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of their minority. 2. If directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minor-

¹ *Smith v. Parsons*, 146 N. Y. 116; *Matter of Keogh*, 112 App. Div. 414, 418, *aff'd* 186 N. Y. 544; *Matter of Ranken*, 101 App. Div. 189, *aff'd* 182 N. Y. 519; *Manice v. Manice*, 43 N. Y. 303, 375, 379; *Draper v. Palmer*, 27 N. Y. State Rep. 510; *Bolton v. Jacks*, 6 Robt. 166, 230; *Willetts v. Titus*, 14 Hun, 554; *Gilman v. Healy*, 1 Dem. 404, 408; *Goebel v. Wolf*, 113 N. Y. 405, 415; *Roe v. Vingut*, 117 N. Y. 204, 217; *Chaplin*, *Express Trusts and Powers*, § 411; 8 *Columbia Law Rev.*, 298.

² *Cullen, J.*, in *Spencer v. Spencer*, 38 App. Div. 403. § 191 *supra*.

ity. 3. All other directions for the accumulation of the income of personal property, not authorized by statute, are void. In either case mentioned in subdivisions one and two of this section a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority."¹

§ 221. In the case of personal property, after the end of the two lives has been reached, there is no further opportunity (as there may be in the case of real property) for suspension, and consequently none for accumulation. It necessarily follows, therefore, that a trust for accumulation, in order to secure any leeway to effect its purpose, must begin within the term of suspension, and may then run on until either the majority, or death during minority, of the infant, or the earlier termination of the two lives.²

The "Statutory Period" for Trusts to Apply Rents.

§ 222. That express trusts of the "third class," to receive and apply rents and profits, occasion a suspension of the absolute power of alienation, is clear and undisputed. That the permissible term of a suspension thus occasioned was, under the Revised Statutes, restricted to the "statutory period," is equally well settled. But a change in the statute, effected by the enactment of the Real Property Law, makes it necessary to consider the question whether this restriction, or any restriction of term, now applies to such trusts.

§ 223. Under the Revised Statutes, there were three

¹ Pers. Prop. L., § 16. Anticipation of directed accumulation, Id. § 17.

² *Manice v. Manice*, 43 N. Y. 303, 381.

sections, 1 R. S. 723, §§ 14, 15 and 16, which so far as now retained are embodied in Real Property Law, § 42. Section 16 need not be here considered. Section 14, in addition to furnishing the mere definition of suspension which is still found in the present statute, provided that, "*Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article.*" And section 15 contained the following general and sweeping prohibition: "The absolute power of alienation shall not be suspended by *any limitation or condition whatever*, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, * * * ." This latter section, which for convenience of reference in the present discussion we may call the "general suspension clause," was often cited by the courts as sufficient support for their holding that the permissible term of present estates held in trust for the receipt and application of rents and profits, was restricted to the statutory period.¹

§ 224. But in the enactment of the Real Property Law, L. 1896, Ch. 547, this general suspension clause was omitted, and has not as yet been restored, Real Prop. L., § 42, and its reference to "any limitation or condition" was transferred to the provision relating to future estates, which now reads as follows:

"*Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever*, for a longer period," etc., thus leaving the provision in a form which seems, on its face, to restrict the term of only such suspension as may be occasioned by the limitation of future

¹ Bailey v. Bailey, 97 N. Y. 460, 468; Crooke v. County of Kings, 97 N. Y. 421, 439.

estates, including future estates in trust, and to omit any restriction upon the term of suspension occasioned by present estates in trust, created to vest in possession in the trustee immediately upon their creation.

§ 225. So far as concerns express trusts for the receipt and *accumulation* of rents and profits, the maximum term of possible suspension is fixed, by virtue of the terms of Real Property Law, §§ 61 and 96, at two lives in being and in certain cases a further minority. But as to present express trusts for the receipt and application of rents and profits, it still remains to consider the effect of the omission from Real Property Law, § 42, of the general prohibition above mentioned.

§ 226. The Consolidators' Notes, in referring ¹ to this omission, state that "A trust estate, in the case of an executed trust, is always a *present estate*, and not a *future estate*, and although it may offend against the spirit of the rule against perpetuities there is no provision now on the statute books avoiding it * * *. The profession has been anxiously expecting some case which would involve this omission. The courts would possibly rectify it by a violent assumption, deciding that no change in the Revised Statutes was intended." It is believed, however, that several sufficient grounds now exist for the opinion that the unfortunate omission of the clause in question has effected no change in the law. These are as follows:

§ 227. (1) It has been noticed that Real Property Law, § 42, still restricts within the statutory period, a suspension occasioned by *future* estates, and the difficulty under consideration is due to the assumed absence of any similar restriction in relation to *present*

¹ Consolidated Laws, Birdseye's Ed., Vol. IV. p. 4940; Wadhams' Ed., Vol. VI, p. 519 of Notes.

estates in trust to receive and apply rents and profits. But upon turning to Real Property Law, § 60, formerly 1 R. S. 725, sec. 36, we find the following:

§ 228. "A disposition of the rents and profits of real property to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, *shall be governed by the rules established in this article* [which includes § 42] *for future estates in real property.*"

§ 229. As § 60 thus incorporates § 42, they may, so far as concerns their relation to the question under discussion, be read as if stated in the form of one section as follows: "Every *future estate*, and every *disposition of rents and profits of real property* to accrue and be received *at any time* subsequent to the execution of the instrument creating such disposition, shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than two lives in being," etc.¹

§ 230. Section 60, therefore, renders applicable to present express trusts to receive and apply rents and profits, the same limitation upon the permissible term of suspension, that is applicable to future estates. Indeed, this proposition is so clear, that it appears entirely probable that it constituted the reason which the

¹ In view of the arguments here adduced, it is probably not necessary to draw into this discussion an intimation, in *Cochrane v. Schell*, 140 N. Y. 516, 538-9, that a reference in another statute, on a different subject, to expectant estates, apparently was not intended to include present trusts. The point is different. It is not here a question of classifying a present trust as a future estate. The statute here under consideration merely says that certain dispositions *shall be governed by the rules established for future estates*.

Commissioners of Statutory Revision considered sufficient to warrant the omission of the general suspension clause from the Real Property Law, on the theory that the matter was adequately covered by other statutory provisions. That such is the effect of Real Property Law, § 60, was long ago firmly established. For not only was it early settled, under the Revised Statutes, that the provisions of section 14 (which, so far as its own express terms went, did not refer, any more than section 42 of the Real Property Law does now, to anything but future estates), applied as well to present as to future estates, and also to trust estates as well as to estates not in trust, but also that § 36, now Real Property Law, § 60, relating to dispositions of rents and profits, was adequate to give this effect to § 14, even if there had then been no general suspension clause.¹ "It was enough that the statute had once declared that the absolute power of alienation should not be suspended beyond a specified period, and that this should not be effected *by any limitation or condition whatever*. But this is not all. The 36th section expressly provides that dispositions of the rents and profits of lands shall be governed by the rules established in relation to future estates. This alone covers the whole ground. It extends to every disposition of rents and profits without any reference to the purpose to which they are to be applied, and it reaches every trust which the testator has attempted to create."²

¹ *Amory v. Lord*, 9 N. Y. 403, 416; *Hawley v. James*, 5 Pai. 317, 458-9, and 16 Wend. 61, 124, 128-132, 163, 166, 174, 265-6; *Clute v. Bool*, 8 Pai. 85; *Thompson v. Carmichael's Ex'rs*, 1 Sandf. Ch. 387, 396; *Lorillard v. Coster*, 5 Pai. 172, 218-224; *Coster v. Lorillard*, 14 Wend. 265, 305, 317-318, 387; *Hone v. Van Schaick*, 7 Pai. 221, 231, 233, and 20 Wend. 564; *Gott v. Cook*, 7 Pai. 521; *Craig v. Hone*, 2 Edw. Ch. 554, 564; *Yates v. Yates*, 9 Barb. 324, 344, 347.

² *Hawley v. James*, 16 Wend. 61, 174.

§ 231. (2) The present § 60 of the Real Property Law, relating to dispositions of rents and profits, represents a legislative approval and continuation, both in 1896, and in 1909, of 1 R. S., § 36, without any change bearing on the question under consideration, and thus is now to be taken as a formal approval by the Legislature of the construction put on § 36 by the cases above cited, in accordance with the familiar principle applied in the cases cited below.¹

§ 232. (3) The Commissioners of Statutory Revision state that the section now numbered 42 is "unchanged in substance." This statement can only be explained by assuming that they relied on the adequacy of § 60, to supply the place of the general suspension clause which they omitted from § 42.

§ 233. (4) The Personal Property Law, § 11, still contains the "general suspension clause" which has been omitted from the Real Property Law. The same rules are to be applied to the two classes of property wherever practicable.²

§ 234. (5) The courts, though without discussion of the point now under consideration, have in fact continued since 1896 to hold, in dealing with trusts to receive and apply rents and profits, the validity of which was to be determined by the provisions of the Real Property Law, that the trustees cannot convey in

¹ *People v. Green*, 56 N. Y. 466, 475; *Matter of Baird*, 126 App. Div. 439, 443; *Hakes v. Peck*, 30 How. Pr. 104; *Pulitzer v. City of N. Y.* 48 App. Div. 6, 10; *Comm. v. Hartnett*, 3 Gray, 450; L. 1909, Ch. 596. Stat. Constr. L., § 95; *United States v. Gilmore*, 8 Wall. 330; cases cited in *Halsey v. Jewett Dramatic Co.*, 114 App. Div. 420, 423, rev'd on other grounds, 190 N. Y. 231. No change should be assumed. *Davis v. Davis*, 75 N. Y. 221; *Whitney v. Whitney*, 63 Hun, 59; *DeGrauw v. Long Island El. R. Co.*, 43 App. Div. 502; 163 N. Y. 597.

² §§ 384, 385, *infra*.

contravention of the trust;¹ that the beneficiary cannot transfer his rights and interests;² that accordingly a suspension is thus effected;³ and finally, have proceeded upon the theory that the permissible term of such suspension is still confined, like that occasioned by future estates, within the limits of the "statutory period."

§ 235. For the Real Property Law became a law May 12, 1896, and became effective October 1, 1896.⁴ The case of *Herzog v. Title Guarantee & Trust Co.*⁵ deals with the will, executed June 9, 1892, in connection with a codicil thereto executed after 1896, of a testator who died March 31, 1901. It was the codicil, executed after 1896, that introduced the question as to the existence or non-existence of a suspension of the power of alienation of real property, illegal because the trust which occasioned it might extend through three lives in being. Although there was another ground for the finding of an illegal suspension, the scheme of the codicil was also regarded as void on account of the trust for three lives. In *Kahn v. Tierney*,⁶ the will was executed after 1896, and if in fact, as well as upon the face of the will, the trust did involve real property, the case is a direct authority to the same effect. But it does not appear clear that real property was involved. The opinion evidently indicates the view that the decision would have been the same, whether real property was involved or not. *Brown v. Quintard*,⁷ and *Whitefield*

¹ *Lewisohn v. Henry*, 179 N. Y. 352.

² *Slater v. Slater*, 114 App. Div. 160, aff'd 188 N. Y. 633; *Lewisohn v. Henry*, 179 N. Y. 352.

³ *Lewisohn v. Henry*, 179 N. Y. 352.

⁴ L. 1896, Ch. 547, § 301.

⁵ 177 N. Y. 86.

⁶ 135 App. Div. 897, aff'd 201 N. Y. 516.

⁷ 177 N. Y. 75.

v. *Crissman*,¹ also appear to be authorities in point. Both relate to wills executed after 1896. In both, the trust was held void because not limited to two lives. The only possible doubt as to their bearing on the present question is, whether they are to be regarded as dealing with real property, or only with personal property. In each there was a power of sale sufficient to obviate suspension of the power to alienate the real property, except for the fact that the purpose of the power was illegal. The power itself being thus void, could not operate to obviate suspension, if any existed, and accordingly the decisions may involve the existence of a suspension, occasioned by a trust to receive and apply rents and profits of real property, and illegal because not duly limited to two lives.²

§ 236. But apart from these cases, there are others, relating clearly to real estate, where, although the will itself was executed while the Revised Statutes were in force, the death of the testator occurred, and the will first became operative, after the Real Property Law had become effective and controlling upon the question of the validity of the trust term.³ These are *Kalish v. Kalish*,⁴ where the trust was held void under Real

¹ 123 App. Div. 233.

² In *Hooker v. Hooker*, 166 N. Y. 156; *Schey v. Schey*, 194 N. Y. 368, and *Matter of Lally*, 136 App. Div. 781, aff'd 198 N. Y. 608, there was perhaps an equitable conversion, and if so, they are not here in point.

³ In such cases the question of whether or not a given testamentary scheme of suspension must, to be valid, be restricted to the "statutory period" would depend on the law as it stood at testator's death. *DePeyster v. Clendining*, 8 Pal. 295, 304, aff'd 26 Wend. 21; *Bishop v. Bishop*, 4 Hill, 138; *Sherman v. Sherman*, 3 Barb. 385, 387; *Adams v. Wilbur*, 1 Fed. Cases, No. 70; *Child v. Child*, 1 N. Y. Leg. Obs. 182, 184; *Ellison v. Miller*, 11 Barb. 332; *Parker v. Bogardus*, 5 N. Y. 309; *Moultrie v. Hunt*, 23 N. Y. 394, 398; *Obecny v. Goetz*, 116 App. Div. 807, and 134 App. Div. 166; original § 1 of the Real Property Law of 1896; § 461 of the Real Property Law as it stands in 1911.

⁴ 166 N. Y. 368.

Property Law, § 32 (now § 42), for undue suspension even apart from the accumulation involved; and *Fraser v. Hoguet*,¹ where the trust was held free from any illegal suspension, and valid, for the reason that it was so framed that it could not continue beyond two lives in being.

§ 237. The general prohibition which was formerly contained in the statute, ought not to have been omitted, and ought, for the sake of clearness, to be re-instated; but nevertheless there appears now to be no room for the suggestion that the omission operated to effect any change in the law as it formerly stood.

§ 238. Reading § 42 in this sense, in connection with § 96, subdivision 3, the mutual relations of the two sections may therefore be stated as follows:

Section 42 deals with the duration of the term of the entire trust, and says in effect, that the whole trust must be begun, carried on, and terminated, within the limit of any two lives that may be designated to measure its duration. "It does not dictate what lives; * * * only, they must be 'in being,' when the trust is created. That is the sole restriction. Any two designated lives are made to serve merely as a standard, or measure of duration, * * * ." ² It looks at the trust as one complete whole, and it marks out a gross term during which the trust as a whole may continue, and beyond which it cannot go. But with the time limits of the interest of each beneficiary, within the boundaries of this gross term, this section has no concern. That branch of the subject is taken up in section 96, which, on its part, prescribes how protracted a beneficial interest may be allotted to each beneficiary while the general trust at large is moving on through its own fixed term.

¹ 65 App. Div. 192.

² *Crooke v. County of Kings*, 97 N. Y. 421, 436; *Bailey v. Bailey*, 97 N. Y. 460.

§ 239. These respective meanings of the two statutory provisions, as applied to suspension occasioned by trusts, may be briefly summed up as follows:

Real Property Law, § 42. *Real Property Law*, § 96.

<p>A suspension occasioned by a trust may continue during a period measured as there prescribed, and no longer.</p>	<p>Subject to these general boundaries, the interest of each beneficiary may continue for his whole life or for any shorter term.</p>
---	---

§ 240. It is evident that whenever the lives of beneficiaries are designated as the ones which shall measure the term of the trust, they fall within the view of both of these statutory provisions. Under one section they appear only as the lives of the beneficiaries, and as serving to show how long each beneficiary may enjoy the trust, and under the other they appear simply as two lives arbitrarily selected to measure the limit of the whole term as such. And the manner in which the two provisions play together without friction, is thus stated by Finch, J., in the opinion of the court in *Crooke v. County of Kings*:¹ "The natural term, which is the lives of all the beneficiaries, and the stipulated term, which is the close of the selected and designated lives, may either, taken separately, work out an unlawful trust; while construed together and in combination as they should be, they bring the trust within the requirement of the statute. The natural term alone might make the trust last beyond the lawful extent of two lives in being. The stipulated term alone might go beyond the lives of the beneficiaries. But the two, combined and made elements of the trust in its creation, effect a lawful duration, and limit the trust to the stipu-

¹ 97 N. Y. 421, 439.

lated term, unless before it is reached the natural term expires; or to the natural term, unless before it is reached the stipulated term expires. Unless the language of the will creating the trust imperatively forbids, where both terms are present as elements of the creation, it must be construed to run for the natural term except as shortened by the stipulated term; or for the stipulated term except as shortened by the natural term. * * * The trust can outrun neither."¹

¹ In the opinion of Cullen, Ch. J., in *Matter of Wilcox*, 194 N. Y. 288, 293, there is a dictum that a trust to receive and apply rents and profits may in some instances be validly created for the period of a minority after two lives. It is believed that this is the first time that the suggestion has ever been mentioned in any reported case, unless involved in *Harrison v. Harrison*, 36 N. Y. 543. See also *Renwick v. Weeden*, 135 App. Div. 695. The authority, *Manice v. Manice*, 43 N. Y. 303, cited by Judge Cullen, related to a trust for accumulation, where the matter is affected by other statutory provisions. But it must be admitted that it is difficult to find any specific statutory provision which explicitly and necessarily renders such a further term void, in all cases, for a trust to receive and apply rents. See, however, *Quade v. Bertsch*, 65 App. Div. 600; 173 N. Y. 615. The point must at present be regarded as perhaps not finally settled.

For its general bearing upon the existence of a suspension of the power of alienation under given express trusts, according to the time of their creation, as affected by different statutes from time to time in force in relation to merger, revocation, etc., (see § 399, *supra*), the following note from *V Columbia Law Review*, 391-393 (May, 1905) is of interest: "The destructibility of a trust in New York therefore seems to depend on the date of its creation. Trusts created prior to January 1, 1830, are destructible by any method known to the common law. Trusts created between January 1, 1830, and April 21, 1893, are indestructible; but it seems to be an open question whether destruction of such a trust would be allowed if a merger were attempted, or was alleged to have occurred by law, between April 21, 1893, and October 1, 1896, if realty, or between April 21, 1893, and October 1, 1897, if personalty, during which periods Section 63 [Real Property Law, section 103] was expressly retroactive. Trusts of either realty or personalty, created between April 21, 1893, and March 25, 1903, are destructible. Trusts created since March 25, 1903, are indestructible." Also Fowler, *Pers. Prop. L.*, § 15; Mr. R. Floyd Clarke's article in *V Columbia Law Review*, 380; *id.* p. 407; *Metcalfe v. Union Trust Co.*, 181 N. Y. 39; and cases cited *supra*, § 63, note 3. To which it may be added, that from April 23, 1909, L. 1909, Ch. 247, adding a new section, 23, to the Personal Property Law, trusts of personal property may be revoked

Combination of Different Trusts and Powers.

§ 241. The foregoing sections have discussed the several trusts provided for by Real Property Law, § 96, subdivisions 1 to 4, as if the valid trust dispositions of a given instrument always fell solely within one or another of those four subdivisions. But in fact, under Real Property Law, § 96, a given instrument may create "one or more" of the four 'classes of express trusts there authorized; and either or any of the trusts so created may be accompanied by powers in trust, and by special provisions modifying, or attempting to modify, the nature of the trust created.¹

§ 242. As a result of combinations of different trusts, or trusts and powers, under the same instrument, it may often happen in a given case that the person who is the trustee of one trust may, by virtue of another trust, or power, acquire a title, or possess an authority, which he would not otherwise have, and that it is necessary in order to ascertain the exact force of a reported decision in that respect, to carefully determine the particular source of his title or authority, as among the several trusts or powers created. In the same way it may often happen that a suspension of the power of alienation which would otherwise exist by reason of a given trust, may be obviated by the presence of an ac-

by the creator thereof, upon written consent of "all the persons beneficially interested." The new statute cited refers by its terms to trusts "heretofore or hereafter created." § 399.

¹ *Salisbury v. Slade*, 160 N. Y. 278, 288; *Bennett v. Garlock*, 79 N. Y. 302, 317; *Harvey v. Brisbin*, 143 N. Y. 151; *Lahey v. Kortright*, 132 N. Y. 450; *Belmont v. O'Brien*, 12 N. Y. 394; *Marvin v. Smith*, 46 N. Y. 571; dissenting opinion of Earl, J., in *Heermans v. Robertson*, 64 N. Y. 332, 346; *Heermans v. Burt*, 78 N. Y. 259; *Buchanan v. Little*, 154 N. Y. 147; *People's Trust Co. v. Flynn*, 188 N. Y. 385; *Dunham v. Deraismes*, 165 N. Y. 65; *Clark v. Clark*, 147 N. Y. 639; *Corse v. Chapman*, 153 N. Y. 466; *Morse v. Morse*, 85 N. Y. 53, 59-60.

accompanying power of sale;¹ or that a freedom from suspension which would otherwise result from the nature of a given trust, may be nullified by the presence of another trust, or of some power with accompanying restrictions.²

§ 243. But a disposition to take effect beyond the statutory period, cannot be sustained on any such theory, if the clear intent of the creator of the trust was to have the trust as such, which effects a suspension, continue through a term not duly measured.³

Rents and Profits Undisposed of.

§ 244. "When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate."⁴

§ 245. This provision thus appears to relate only to cases where, in addition to other elements specified, there is a suspension, and that suspension exists "in consequence" of a valid limitation of an expectant estate.⁵ In some of the cases, however, the statute has been applied where the suspension was occasioned solely

¹ Robert v. Corning, 89 N. Y. 226; Belmont v. O'Brien, 12 N. Y. 394; Vernon v. Vernon, 53 N. Y. 351; Marvin v. Smith, 56 Barb. 600, aff'd 46 N. Y. 571; Spitzer v. Spitzer, 38 App. Div. 438.

² Cases above cited, and Chapter V.

³ Herzog v. Title Guarantee and Trust Co., 177 N. Y. 86.

⁴ Real Prop. L., § 63.

This applies both to real and to personal property, Mills v. Husson, 140 N. Y. 99, 104; United States Trust Co. v. Soher, 178 N. Y. 442, 450; St. John v. Andrews Institute, 191 N. Y. 254, 280.

⁵ Cochrane v. Schell, 140 N. Y. 516, 538-9.

by a present estate in trust;¹ or by the future equitable interest, under a trust, of a present beneficiary.² The common law rule, as applied under the law of descent, and distribution, to the case of realty, and personalty, and the two blended in one, and as applied to a residue; and the New York statutory rule and its scope, and the principles applicable where it does not apply, are discussed in many cases.³

¹ *Matter of Tompkins*, 154 N. Y. 634; *Matter of Harteau*, 125 App. Div. 711, app. dism'd. 196 N. Y. 513; *Embury v. Sheldon*, 68 N. Y. 227, 238; *Gould v. Rutherford*, 6 Misc. 72; 79 Hun, 280; *Lowenhaupt v. Stanisics*, 95 App. Div. 171. See also *Matter of Roos*, 4 Misc. 232.

² *Pray v. Hegeman*, 92 N. Y. 508. Compare, however, *Cochrane v. Schell*, 140 N. Y. 516, 538-9.

³ *Cochrane v. Schell*, 140 N. Y. 516; *United States Trust Co. v. Soher*, 178 N. Y. 442, 450; *St. John v. Andrews Institute*, 191 N. Y. 254, 279, 280; *Meldon v. Devlin*, 31 App. Div. 146, 156-8, aff'd 167 N. Y. 573; *Matter of Hoyt*, 116 App. Div. 217, aff'd 189 N. Y. 511; *Matter of Brown*, 154 N. Y. 313; *Delafield v. Shipman*, 103 N. Y. 463, 469; *Barbour v. DeForest*, 95 N. Y. 13; *Cook v. Lowry*, 95 N. Y. 103; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Schettler v. Smith*, 41 N. Y. 328, 340; *Williams v. Williams*, 8 N. Y. 525; *Matter of Dey Ermand*, 24 Hun, 1, 5; *Reeves v. Snook*, 86 App. Div. 303; *Matter of Viele*, 35 App. Div. 211; *Levi v. Scheel*, 124 App. Div. 613. See also *Matter of Martinus*, 65 Misc. 135; *Matter of Pray*, 48 Misc. 285; *Chaplin, Express Trusts and Powers*, §§ 489, 494.

CHAPTER V.

SUSPENSION OCCASIONED BY POWERS.

POWERS DEFINED AND CLASSIFIED.

RELATION OF POWERS TO TITLE.

RELATION OF POWERS TO SUSPENSION.

POWERS THAT DO NOT OCCASION SUSPENSION.

- (a) Beneficial Powers.
- (b) General Powers to Sell or Convey.
- (c) Powers to Hold and Manage.
- (d) Determinable Powers to Sell in Future.
- (e) Revocable Powers.

POWERS THAT DO OCCASION SUSPENSION.

- (a) Powers of Sale, Proceeds to Trustee.
- (b) Powers of Sale, Proceeds to Persons not in Being.
- (c) Imperative Powers to Appoint.
- (d) Imperative Powers to Convey.
- (e) Non-Terminable Powers to Sell in Future.

POWERS THAT OBTAIN SUSPENSION.

THE STATUTORY PERIOD AS TO POWERS.

Powers Defined and Classified.

§ 246. A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform.¹

§ 247. A power is either general or special, and either beneficial or in trust.²

¹ Real Prop. L. § 131. As to powers of attorney, see *id.* § 130.

² *Id.*, § 133; *Cutting v. Cutting*, 86 N. Y. 522; *Sweeney v. Warren*, 127 N. Y. 426, 434; *Hume v. Randall*, 141 N. Y. 499; *Deegan v. Wade*, 144 N. Y. 573, 578; *Weinstein v. Weber*, 178 N. Y. 94, 100; *Kinnler v. Rogers*, 42 N. Y. 531; *Matter of Blauvelt*, 131 N. Y. 249. Designation of

§ 248. A power is general, where it authorizes the transfer or incumbrance of a fee, by either a conveyance or a will of, or a charge on, the property embraced in the power, to any grantee whatever.¹ A power is special where either: 1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or, 2. The power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee.² A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in the article on Powers, is void.³ A general power is in trust, where any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.⁴ A special power is in trust, where either, 1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or, 2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.⁵

§ 249. The grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he

beneficiary. *Sweeney v. Warren*, 127 N. Y. 426, 433. Compare *Matter of Stewart*, 131 N. Y. 274, 279; *Towler v. Towler*, 142 N. Y. 371; *Meldon v. Devlin*, 31 App. Div. 146, aff'd 167 N. Y. 573; *Read v. Williams*, 125 N. Y. 560.

¹ Real Prop. L., § 134.

² Id. § 135.

³ Id. § 136.

⁴ Id. § 137.

⁵ Id. § 138.

might lawfully grant to another; and a power thus reserved is subject to the provisions of the statute concerning powers, in the same manner as if granted to another.¹

Relation of Powers to Title.

§ 250. Powers, when viewed with reference to their bearing upon the title to the property affected, are of two classes; for on the one hand, the grant of an "absolute power of disposition" operates automatically, under certain circumstances specified in the statute, to effect an absolute fee in the grantee of the power;² and on the other hand, in other cases, the power does not operate by its existence to confer a fee on the grantee, and the title and the power remain distinct. Thus the title may be vested in one person, while a power to convey is in another;³ or the title to some given estate in the property less than an absolute fee and the power to

¹ Id. § 144.

In addition to the discussion in the following sections of statutory provisions and decisions relating particularly to suspension, see for a general outline of the law of powers, their creation, construction, scope, execution and termination, and for further definitions of terms employed, Real Prop. L. § 130-182; Cutting v. Cutting, 86 N. Y. 522; Farmers' Loan & Trust Co. v. Kip, 192 N. Y. 266; Corse v. Chapman, 153 N. Y. 466; Leggett v. Firth, 132 N. Y. 7; Cahill v. Russell, 140 N. Y. 402; Matter of Gantert, 136 N. Y. 106; Phillips v. Davies, 92 N. Y. 199, 203; Cussack v. Tweedy, 126 N. Y. 81; Bruner v. Meigs, 64 N. Y. 506; Mutual Life Ins. Co. v. Shipman, 119 N. Y. 324; N. Y. L. I. & T. Co. v. Livingston, 133 N. Y. 125; Lockwood v. Mildeberger, 159 N. Y. 181; Fargo v. Squiers, 154 N. Y. 250, 262; Mott v. Ackerman, 92 N. Y. 539; Coann v. Culver, 188 N. Y. 9, 16; Lahey v. Kortright, 132 N. Y. 450, 456; Cooke v. Platt, 98 N. Y. 35, 39; Royce v. Adams, 123 N. Y. 402, 405; Greenland v. Waddell, 116 N. Y. 234, 240; Ward v. Ward, 105 N. Y. 68.

² Real Prop. L., §§ 149-154. This subject is discussed, *infra*, § 298.

³ Henderson v. Henderson, 113 N. Y. 1; Mutual Life Ins. Co. v. Shipman, 108 N. Y. 19; Chamberlain v. Taylor, 105 N. Y. 185, 192; Dana v. Murray, 122 N. Y. 604; Garvey v. McDevitt, 72 N. Y. 556; Real Prop. L. §§ 41, 97, 99; Sayles v. Best, 140 N. Y. 368; Skinner v. Quin, 43 N. Y. 99; Crittenden v. Fairchild, 41 N. Y. 289; Kinnier v. Rogers, 42 N. Y. 531; Drake v. Paige, 127 N. Y. 562.

convey any estate other than the given one, may be in the same person; or the title to a given estate may be held by one person in trust and the same person may have a power to dispose of that estate, or other estates, or the fee.¹

Relation of Powers to Suspension.

§ 251. In previous Chapters we have considered suspension of the absolute power of alienation as occasioned by certain contingencies, and by certain express trusts. The present Chapter deals with the relation of powers to suspension. And the test of the distinction between powers that do, and those that do not occasion such suspension, is found in the statutory provision that "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed."²

§ 252. It has often been stated that there are only two ways in which a suspension of the power of alienation can be effected, namely by certain contingencies, and by certain express trusts.³ But on the other hand, the statute recognizes the proposition that the absolute right of alienation may be suspended "by an instrument in execution of a power," and provides that the period of such suspension shall be computed, not from the date of such instrument, but from the time of the creation of the power.⁴ And so also where a power of sale is created, to be exercised at the expiration of a

¹ Power to an executor to change a life estate into a fee, and thereby cut off remainders. *Viele v. Keeler*, 129 N. Y. 190.

² Real Prop. L., § 42.

³ *Wilber v. Wilber*, 165 N. Y. 451, 456; *Steinway v. Steinway*, 163 N. Y. 183, 194; *Smith v. Edwards*, 88 N. Y. 92, 103; *Everitt v. Everitt*, 29 N. Y. 39, 71-2; *Leonard v. Burr*, 18 N. Y. 96, 107. See § 124, *supra*.

⁴ Real Prop. L., § 178. See also *id.* § 179; and § 294, *infra*.

period not duly measured by lives in being, and its exercise in the meantime is expressly prohibited, "the power does suspend the absolute power of alienation until that time, and is, therefore, void."¹

§ 253. It accordingly appears that in some sense there are in reality three ways, namely by certain contingencies, by certain express trusts, and by certain powers, that the suspension of the absolute power of alienation can be occasioned. The exact meaning, however, of the proposition that this result can be accomplished by a power calls for precise determination, and it is believed that the apparent discrepancy between the two forms of stating the matter will, with one exception hereafter considered, disappear upon analysis.

§ 254. In the first place, the mere proposition that the power of alienation may be suspended by an instrument in execution of a power, is in itself in no way inconsistent with the proposition that a suspension can only be occasioned by certain contingencies or certain trusts. For the former proposition as to powers relates only to the nature of the instrument itself by means of which the suspension may be created, and not at all to the way in which its provisions operate to occasion that result. It only amounts to this, that the power of alienation may be suspended not only by means of a deed or a will of the owner of the title, but also by means of an instrument by which the grantee of a power, executes the power.² But when we come to examine the way in which an instrument in execution of a power does operate to occasion a suspension, we find that it must do so merely by the forms of disposition

¹ Matter of Christie, 59 Hun, 153, 158, aff'd as Matter of Will of Butterfield, 133 N. Y. 473.

² Everitt v. Everitt, 29 N. Y. 39, 78.

which might have been adopted for the same purpose in the original instrument by which the power was created. For "An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power."¹ Thus the grantee of the power, if so authorized, might effect a suspension by the creation of certain express trusts, or by the limitation of certain contingent future estates, and the validity of the period of the suspension thus effected would be determined by computing the same from the time of the creation of the power.² In such cases while the suspension may in fact be brought into operation by the execution of the power, the way in which the suspension is occasioned is still found to be by an express trust or a contingency. Illustrations of this class are found in the following sections.

§ 255. And a similar result may follow even before the power has in fact been executed. If, for example, the terms of its creation are such as to require the grantee to execute it by creating a trust or a contingency from which a suspension will result, it necessarily follows that in the meantime, and pending the execution, a suspension already exists. And the same result follows if the terms of the instrument creating the power require its execution only at a future time, in favor of persons not yet in being. But the way in which the suspension pending the execution of the power is occasioned in such cases is still to be found in the trust, or the contingency, involved in the provisions of the original instrument. Illustrations of this class are also to be found in the following sections. So far as concerns these cases, therefore, the recognition of the fact

¹ Real Prop. L., § 179; *Everitt v. Everitt*, 29 N. Y. 39, 78.

² § 294, *infra*.

that a suspension may be effected by a power, does not impair the force of the proposition that the only way in which a suspension can be occasioned is by certain express trusts or by certain contingencies.

§ 256. But there is one exceptional class of cases which presents some difficulty. This class is illustrated by *Matter of Christie*.¹ Here the power, which was a power in trust to sell for the benefit of persons in being, had not been exercised; there was nothing in the will to require, or even to permit, the grantee of the power, in executing it, to create either a trust or a contingent future estate; and yet it was held that a suspension resulted from the fact that the execution of the power was expressly forbidden until a future time; and as the intervening term was not restricted within the limits of the "statutory period," the power was void. This case may indicate that there is a third way to occasion a suspension.²

§ 257. In the final analysis, however, the controlling principle is found in the statutory declaration that "the absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed," and the only purpose of an effort to ascertain how many ways there are to effect such suspension, is therefore merely to determine what forms of disposition do thus result in an absence of persons in being who can convey an absolute fee in possession. To this end we will now proceed to classify the various forms of powers, according as they do not, or do, in the sense already discussed, operate to occasion, or co-operate in occasioning, an absence of such persons in being, or operate to obviate

¹ 59 Hun, 153, affirmed as *Matter of Butterfield*, 133 N. Y. 473.

² § 286.

a suspension which would otherwise exist. And in the course of this discussion we will further consider the case of powers the exercise of which is expressly prohibited until a future time. In the following classification the various subdivisions are offered merely as a succession of illustrative examples, from different points of view, of the main classes to which they belong. It should here be noticed that the mere possibility that a power valid in itself, and authorizing valid acts in execution thereof, might thereafter be improperly utilized by its grantee in an attempted creation of an illegal suspension, does not operate in the meantime to effect a suspension.¹ It is also to be noticed that the grantee of a power might in some cases in executing it, dispose of the property in exactly the same manner as would have resulted in case the power had not been executed at all.²

Powers that do not Occasion Suspension.

§ 258. This class consists of powers, the existence of which does not involve an absence of persons in being who can convey an absolute fee.

(a) Beneficial Powers.

§ 259. Under a beneficial power, no person other than the grantee thereof has any interest in its execution,³ and thus generally and probably invariably, the grantee has such ability to either exercise the power, or in some

¹ §§ 115, 278.

² *Matter of Lansing*, 182 N. Y. 238; *Matter of Delano*, 176 N. Y. 486; *Matter of Cooksey*, 182 N. Y. 92; *Matter of Vanderbilt*, 50 App. Div. 246, 163 N. Y. 597 (see *Matter of Dows*, 167 N. Y. 227); *Matter of Pell*, 171 N. Y. 48; *Matter of Langdon*, 153 N. Y. 6; *Matter of Chapman*, 133 App. Div. 337, 196 N. Y. 561; *Matter of Spencer*, 119 App. Div. 883, 190 N. Y. 517; *Matter of Haggerty*, 128 App. Div. 479, 194 N. Y. 550.

³ Real Prop. L., § 136.

way extinguish the same, as to render it incapable of effecting suspension by its mere existence. But such a power may be so executed as to thereby create a suspension. So an "absolute power of disposition" in the sense, and under the circumstances, set forth in Real Prop. Law, §§ 149-153, cannot occasion a suspension, because it operates automatically, by its mere existence, to invest the grantee of the power with a fee.¹

(b) General Powers to Sell or Convey.

§ 260. In one class of cases, a valid power to sell is given, under which a sale may be made at any time, and either with or without a power to receive the rents pending the sale. No such power can by itself alone occasion a suspension of the absolute power of alienation of the real property in question. By its very terms there are persons in being who can alien absolutely. This is equally true where a future date is fixed for the exercise of the power, if the grantee thereof is permitted to sell in the meantime in his discretion.² So with a present and continuing power to sell, appraise and divide,³ or to sell and distribute,⁴ or to convey, free from any express trust, to designated persons in being, or to make a beneficial appointment among designated persons in being.⁵

(c) Powers to Hold and Manage.

§ 261. There may be a valid power in trust to retain possession of land vested in a grantee or devisee, man-

¹ § 298.

² Robert v. Corning, 89 N. Y. 225, 235, 239, and other cases cited, § 42 *et seq.*

³ Manice v. Manice, 43 N. Y. 303.

⁴ Robert v. Corning, 89 N. Y. 225.

⁵ See the cases cited in succeeding sections, where any suspension existing is due to the absence of the features just mentioned.

age the same, receive the rents and profits, pay charges therefrom, and pay over the surplus rents to the legal owner. The performance of such duties does not necessitate a trust, and such a power does not occasion a suspension of the absolute power of alienation. The legal title is in the grantee or devisee, and he may at any time convey an absolute title. Consequently, such a power may be created for a term not measured by lives in being, or to begin after the full statutory period of suspension has expired.¹ If, however, the provision is of such a nature that it would, if sustained, operate to render alienation impossible, during a term not duly measured, it is void.² And a fully constituted express trust cannot be held to be only a provision for custody and care of property, for the purpose of avoiding an illegal suspension.³

(d) Terminable Powers to Sell in Future.

§ 262. Where land is directed to be converted into money by the exercise of a power in trust, and the money is to be paid over to designated persons; or where money is directed to be laid out in the purchase of land for designated persons; and these persons are of lawful age and, upon the actual conversion, at once entitled, directly and not in trust, to receive the property in its new form, in such a case they may, before the conversion has

¹ *Hawley v. James*, 16 Wend. 61; *Everitt v. Everitt*, 29 N. Y. 39, 80; *Tucker v. Tucker*, 5 N. Y. 408; *Post v. Hover*, 33 N. Y. 593; *Radley v. Kuhn*, 97 N. Y. 26, 34; *Vanderpoel v. Loew*, 112 N. Y. 167; *Cussack v. Tweedy*, 126 N. Y. 81, 88; *Provost v. Provost*, 70 N. Y. 141, 146; *Henderson v. Henderson*, 113 N. Y. 1, 12; *Durfee v. Pomeroy*, 154 N. Y. 583, 595; *Foote v. Bruggerhof*, 66 Hun, 406; *Matter of Wilkin*, 183 N. Y. 104; *Quade v. Bertsch*, 65 App. Div. 600, *aff'd* 173 N. Y. 615; *Blanchard v. Blanchard*, 4 Hun, 287, *aff'd* 70 N. Y. 615. See also in general as to both real and personal property, § 126.

² *Bennett v. Chapin*, 77 Mich. 526.

³ *Fargo v. Squiers*, 154 N. Y. 250, 260.

actually taken place, elect to take the land in the one case, or the money in the other, in its unconverted form (if the rights of others will not be affected by such election); and the exercise of the election terminates the power to convert.¹

§ 263. And wherever, under a power in trust, the beneficiary is also vested with the title to the real estate as the heir or devisee, he may, even though not upon the sale at once entitled to the receipt of the proceeds, and before the power has been or could be exercised, convey the real estate by warranty deed, and thus defeat or annul the power of sale. A general power in trust is never to be exercised for the benefit of the donee of the power. He has no beneficial interest in its exercise. He must exercise it for the sole benefit of the beneficiaries of the power, and when for any reason it is impossible to exercise it for their benefit, it cannot be exercised.² And it seems that even though the beneficiary under the power is not literally vested with the technical legal title to the land, he may nevertheless release to the person in whom the bare legal title is vested, and thus terminate the power.³

§ 264. Powers which, even though not to be exercised until a future date, may at any time be annulled or ter-

¹ *Prentice v. Janssen*, 79 N. Y. 478, 485; *Hetzel v. Barber*, 69 N. Y. 1; *Armstrong v. McKelvey*, 104 N. Y. 179; *Parker v. Linden*, 113 N. Y. 28, 38; *Mellen v. Mellen*, 139 N. Y. 210, 220; *McDonald v. O'Hara*, 144 N. Y. 566, 569; *Trask v. Sturges*, 170 N. Y. 482, 497; *Mandlebaum v. McDonell*, 29 Mich. 78, 86; *Sayles v. Best*, 140 N. Y. 368; *Kilpatrick v. Barron*, 125 N. Y. 751, 752; *Lane v. Albertson*, 78 App. Div. 607, 615; *Compare Mullins v. Mullins*, 79 Hun, 421; *Smith v. Farmer Type Founding Co.*, 16 App. Div. 438.

² *Garvey v. McDevitt*, 72 N. Y. 556, 563; *Greenland v. Waddell*, 116 N. Y. 234, 246; *Hetzel v. Barber*, 69 N. Y. 1, 12.

³ *Garvey v. McDevitt*, 72 N. Y. 556, 563; *Armstrong v. McKelvey*, 104 N. Y. 179, 183-4.

minated by the beneficiaries, as above set forth, do not operate to suspend the power of alienation.¹

§ 265. The foregoing doctrine of election is founded upon the presumption that the power is given for the benefit and convenience of the devisees or legatees and, unless made so in terms, was not intended to be imperative, so as to prevent the beneficiaries from taking the donor's bounty except in the precise form in which the property would exist after the conversion.²

§ 266. The usual statement of the general principle, as above set forth, includes the condition that the parties exercising the election shall be of lawful age.³ Whether, in such a case, the infant might elect through his guardian, appears not to be settled.⁴ But even assuming that this could not be done, it would still appear that the resulting inability to elect would not in itself change the result as applied to the question of suspension. For it would nevertheless be the fact that except for the infancy, there would be no suspension. And an inalienability occasioned solely by infancy is not of such a nature as to effect suspension in the sense contemplated by the statute.

(e) Revocable Powers.

§ 267. It is provided by the Real Property Law, § 148, that "A power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power." If,

¹ Garvey v. McDevitt, 72 N. Y. 556; Buchanan v. Tebbetts, 69 Hun, 81.

² Mellen v. Mellen, 139 N. Y. 210, 220; Trask v. Sturges, 170 N. Y. 482, 497; Lane v. Albertson, 78 App. Div. 607, 615. See § 286.

³ Prentice v. Janssen, 79 N. Y. 478, 485; Mellen v. Mellen, 139 N. Y. 210, 220; Trask v. Sturges, 170 N. Y. 482, 497.

⁴ McDonald v. O'Hara, 144 N. Y. 566, 569.

then, by the terms of the instrument creating a power, it is rendered revocable at the mere option of the grantor or others, it would appear that it could not in any case occasion, or operate as an element in occasioning, any suspension.¹

§ 268. The foregoing instances of powers that do not occasion suspension are given as illustrative examples, and not as necessarily constituting a complete list of all the cases within the class.

Powers that do Occasion Suspension.

§ 269. This class consists of powers which involve an absence of persons in being who can convey an absolute fee in possession, or which co-operate with other causes to effect that result. The brief headings of the following subdivisions are accordingly intended to refer only to such powers as belong to this particular class.

(a) Powers of Sale, Proceeds to Trustee.

§ 270. Where there is a power to sell real property at a future date and pay over the proceeds to a trustee of an express trust of such a nature as of itself to occasion a suspension, the power co-operates to occasion a suspension of the absolute power of alienation. Thus, a testator directed his executors that four years after his decease they should sell his real estate at public or private sale, and pay over the proceeds to the Bishop of Raphoe upon certain trusts. If the will had directed the proceeds to be paid over absolutely to the bishop for his own use, he could, as the sole beneficiary of the power in his own right, have released his right to the

¹ Compare the last preceding subdivision, and also § 56, relating to revocable express trusts.

proceeds to the heirs of the testator, and thus have perfected in them an absolute title, which could not afterward be defeated by the exercise of the power. "But the difficulty here is that the proceeds were not to be paid over to the bishop in his own right. They were to be paid to him as a trustee; * * * he was to have no personal or private interest in the trust fund. * * * He could not, therefore, release to the heirs. * * * Notwithstanding anything he may do during the four years, the executors must sell and pay over the proceeds to him or his successor, as trustee. Therefore, during the four years, there are no persons in being who can convey an absolute fee in possession." ¹

§ 271. The same principle applies where, instead of postponing the exercise of the power, the instrument creates a power of sale exercisable at any time, but directs the donee, at the date of actual sale or other future date, to pay the proceeds to the trustees of such a trust as to occasion suspension, or from that date to himself hold the proceeds upon such a trust. In this case there would be no suspension of the absolute power of alienation of the designated real property, but there would be a suspension of the absolute ownership of the proceeds.² In order to be valid, the suspension thus caused must be duly confined within the statutory period.

§ 272. It may properly be said that a suspension arising under this subdivision is really caused not directly by the power, but by the trust for the benefit of which the power is to be exercised, thus illustrating the class of suspension treated in Chapter IV.

¹ Garvey v. McDevitt, 72 N. Y. 556; see Beekman v. Bonsor, 23 N. Y. 298, 317.

² Chapter VII., Allen v. Allen, 149 N. Y. 282; Stoiber v. Stoiber, 40 App. Div. 156; Hagemeyer v. Saulpaugh, 97 App. Div. 535, 544.

(b) Powers of Sale, Proceeds to Persons not in Being.

§ 273. Where there is a power in trust to sell, and an imperative power to pay over the proceeds, at a future date, to all the then living members of a designated class, including such, if any, as were not in being at the original creation of the power, a suspension necessarily results. Thus, in *Dana v Murray*,¹ where such a state of facts existed, and the period before the sale could take place and the beneficiaries be ascertained was not measured by two lives, the court say: "Such proceeds were directed to be divided among all of her children who may then be living, and the issue of any of them who may be dead. * * * It follows that the power in question, under the express provision of the statute, is imperative, and its execution will be compelled by the court; and this being the case, it operates to suspend the vesting of the fee until the power is executed or the estate is terminated."

§ 274. Here again, as illustrated in subdivision (a) *supra*, a mere unqualified power to sell, does not by itself alone effect suspension of the absolute power of alienation; it is the absolute ownership of the proceeds that is suspended; and it may properly be said that such suspension is really caused not by the power, but by the fact that the persons who, or some of whom, may become entitled in future to receive the proceeds, are not in being, thus illustrating the class of suspension treated above in Chapter III.² For if, the other facts being the same, the particular individuals who must certainly become entitled to receive the proceeds are in being at the creation of the power, and are desig-

¹ 122 N. Y. 604, 613.

² Similar principles apply to dispositions of personal property. *Tucker v. Bishop*, 16 N. Y. 402.

nated, no contingency or suspension exists;¹ while if the future interest is either contingent by reason of the fact that now unborn persons may yet prove to be the persons who shall be entitled in their own right to all or some part of the proceeds,² or is vested subject, prior to the time for distribution, to be divested in favor of persons some or all of whom may be yet unborn;³ then in either of such cases a suspension exists.⁴ Though if the suspension thus resulting is duly confined within the statutory period, it is, of course, not illegal.⁵

§ 275. While this subdivision (b) includes, it is not confined to, cases where the exercise of the power of sale to raise the proceeds payable in future to persons not yet in being, is prohibited until a future time.⁶

(c) Imperative Powers to Appoint.

§ 276. The existence of a trust power of appointment,⁷ may suspend, or co-operate in suspending, the absolute power of alienation. Such a suspension exists where the instrument by which the power was created imperatively requires its exercise at a future time in such manner that in the meantime there are no persons in being competent to in anyway override or annul the power

¹ *Goebel v. Wolf*, 113 N. Y. 405; *United States Trust Co. v. Roche*, 116 N. Y. 120, 130; *Henderson v. Henderson*, 113 N. Y. 1; *Kilpatrick v. Barron*, 125 N. Y. 751, 755; *Matter of Young*, 145 N. Y. 535.

² *United States Trust Co. v. Roche*, 116 N. Y. 120, 131; *Trowbridge v. Metcalf*, 5 App. Div. 318; *aff'd* 158 N. Y. 682; *Haug v. Schumacher*, 166 N. Y. 506; *Dana v. Murray*, 122 N. Y. 604, 617; *Delafield v. Shipman*, 103 N. Y. 463; *Delaney v. McCormick*, 88 N. Y. 174.

³ *Haug v. Schumacher*, 166 N. Y. 506; *Matter of Brown*, 154 N. Y. 313; *Trowbridge v. Metcalf*, 5 App. Div. 318, *aff'd* 158 N. Y. 682.

⁴ Cases above cited; *Hone's Exrs. v. Van Schaick*, 20 Wend. 564.

⁵ *Haug v. Schumacher*, 166 N. Y. 506.

⁶ Cases above cited.

⁷ See *Floyd v. Smith*, 140 N. Y. 337; *Real Prop. L.*, § 158.

and effectuate the vesting of an absolute fee in possession.¹

§ 277. A power of appointment which confers or imposes upon the grantee thereof the right or duty to himself personally select the appointees, among the members of a class, confers no right on any particular member of the class, prior to an appointment, to claim title to any part of the property. When the time for appointment arrives, the court can compel an exercise of the power, but cannot control the discretion of the grantee in the selection of the appointees.² Examples may be found in the case of a power which imperatively requires the future appointment of an estate upon a trust to receive and apply the rents and profits, or an appointment in favor of persons not in being at the creation of the power. In the meantime, no alienation is possible, and if the duration of the term is not duly limited, the scheme is void.³

§ 278. "But a power is not bad for remoteness, because some of the objects thereof are not within the limits allowed by law; for those may be selected to whom a valid appointment in this respect may be made. (*Attenborough v. Attenborough*, 1 K. & J., 296; *Hockley v. Mawbey*, 1 Ves. 150.) It would be otherwise if the power did not authorize an exclusive appointment;

¹Imperative and discretionary powers. Real Prop. L., § 157; *Dana v. Murray*, 122 N. Y. 604; *Hone's Exrs. v. Van Schaick*, 20 Wend. 564.

²Matter of Stewart, 131 N. Y. 274, 279, 281. Real Prop. L., §§ 158, 160. Compare *Meldon v. Devlin*, 31 App. Div. 146, aff'd 167 N. Y. 573; *Sweeney v. Warren*, 127 N. Y. 426, 433; *Towler v. Towler*, 142 N. Y. 371; *Tilden v. Green*, 130 N. Y. 29, 46; *Montignani v. Blade*, 145 N. Y. 111; *Coleman v. Beach*, 97 N. Y., 545.

³*Hone's Exrs. v. Van Schaick*, 20 Wend. 564, 566; *Garvey v. McDevitt*, 72 N. Y. 556; *Dana v. Murray*, 122 N. Y. 604, 617; *Genet v. Hunt*, 113 N. Y. 158. See *Hillen v. Iselin*, 144 N. Y. 365, 379; *Smith v. Floyd*, 140 N. Y. 337. Effect of power, upon vesting. Real Prop. L., § 41.

in such a case, the appointment must necessarily include objects without the limits, and the whole power would consequently be bad.”¹ And even though the terms of the power as created are such as not to require any illegal exercise, yet if the donee, in making the appointment, does in fact attempt to create an illegal suspension, the appointment so made is void.²

§ 279. And inasmuch as the period of suspension which results from the making of the appointment, is to be computed as from the time of the creation of the power,³ it follows that decisions as to validity of the term under an actual appointment, also determine the validity of the same provisions, before the power is exercised, if imperatively required by the original instrument.⁴ But in any case if the period of suspension is duly confined within the limits of the statutory period, the scheme is valid under Rule I.⁵

§ 280. As in subdivisions (a) and (b) *supra*, and for the same reasons there set forth, it may be said that the suspension which may be occasioned by the existence of an imperative power of appointment, is caused not by the power, but by the fact that the persons in whom, or in some of whom, the future estate may become vested, are not in being, thus illustrating the class of suspension treated in Chapter III, or that though in being they cannot convey because they are to take under

¹ Farwell on Powers, 1st Ed., p. 90.

² Genet v. Hunt, 113 N. Y. 158; Fargo v. Squiers, 154 N. Y. 250; Tweddell v. New York Life Insurance Co., 49 App. Div. 258, 262, *aff'd* 166 N. Y. 608; Farmers' Loan and Trust Co. v. Kip, 192 N. Y. 266.

³ Real Prop. L., § 178.

⁴ Genet v. Hunt, 113 N. Y. 158; Fargo v. Squiers, 154 N. Y. 250; Hillen v. Iselin, 144 N. Y. 365, 378; Farmers' Loan & Trust Co. v. Kip, 192 N. Y. 266; Maitland v. Baldwin, 70 Hun, 267.

⁵ Hillen v. Iselin, 144 N. Y. 365, 379; Fargo v. Squiers, 154 N. Y. 250, 259; Maitland v. Baldwin, 70 Hun, 267.

a trust such that a conveyance would be in contravention of its terms, thus illustrating the class of suspension treated in Chapter IV.

(d) Imperative Powers to Convey.

§ 281. This class differs from the preceding, in that the power does not confer upon the donee the right or duty of selection, but requires a conveyance, at a future time, to all such persons as shall then answer to a given description. The rule on this subject has been stated as follows: "Where a future interest is devised, not directly to a given person, but indirectly through the exercise of a power conferred upon trustees, the devise is designed to be contingent, and survivorship at the time of distribution is an essential condition to the acquisition of an interest in the subject of the gift."¹

§ 282. In the case last cited, and as applied to the situation as it actually existed, the devise was in trust to receive and apply the rents and profits to the use of E for life and if she died without issue then to the use of M for life, and on M's death to convey the remainder "to the children and lawful heirs of my brother H deceased, to share and share alike, per stirpes." E died without issue, leaving M surviving. At the death of testatrix, there were living ten children of H, but they all died before E. Some of them left wills under which any interest which vested in them at the death of the testatrix, if any, would pass. At the death of M there were living heirs of H. It was held that the remainder to the heirs of H was contingent until the death of M and then first vested in the then living heirs of H and that the devisees of the children of H took no interest. It will be noticed that if, instead of holding the remain-

¹ Matter of Baer, 147 N. Y. 348, 354.

der contingent, the court had held it to be vested, at the death of testatrix, in the children of H, subject to being divested either by the death of E leaving issue, or by the death of the respective children of H before the death of E and M,¹ the net result would have been exactly the same, namely that the ten children having died before the time named for the conveyance of the ultimate remainder, their vested title would have been divested, and those who were then the heirs of H would take.² So that what *Matter of Baer* really holds is that the remainder did not vest absolutely in the children of H, or absolutely in anyone, until it could be known, at the death of M who were the then living heirs of H.

§ 283. The existence of a power to convey is mentioned in the opinion in *Townshend v. Frommer*,³ as a factor in the finding that the vesting of such a remainder is postponed. But the real reason lies in the evident intent of the testatrix that only those should take who should, at the death of M, then be H's living heirs,⁴ and the power to convey at that time figures merely as evidence, and, under the circumstances stated, as controlling evidence of that intent.⁵ That this is true, appears very clearly from the fact that if the particular persons who would be entitled to the conveyance had been named, the existence of the power to convey would not have been inconsistent with the absolute vesting in interest of the remainder prior to the time for the conveyance.⁶ And when the time for

¹ As in *Campbell v. Stokes*, 142 N. Y. 23; *Moore v. Appleby*, 108 N. Y. 237; and *Knowlton v. Atkins*, 134 N. Y. 313.

² *Dougherty v. Thompson*, 167 N. Y. 472, 487-8.

³ 125 N. Y. 446. Cf. *Real Prop. L.*, § 41.

⁴ And see also *Townshend v. Frommer*, 125 N. Y. 446, 460.

⁵ *Matter of Brown*, 154 N. Y. 313, 324.

⁶ *Goebel v. Wolf*, 113 N. Y. 405; *Adams v. Perry*, 43 N. Y. 487; *Gilman v. Reddington*, 24 N. Y. 9; *Wilber v. Wilber*, 165 N. Y. 451; *Matter of Young*, 145 N. Y. 535.

such a conveyance does arrive, and irrespective of whether or not the persons then entitled to possession have theretofore been ascertained or not, the remainder vests in possession automatically, without the need of any actual conveyance.¹

§ 284. Under the present subdivision, if a suspension exists, its cause is found in the fact that for all that is now known to the contrary, or can be determined, the persons to whom a conveyance is to be made when the time comes, as purchasers in their own right, may be persons not now in being.² This principle, so far as concerns suspension of the absolute power of alienation, harmonizes all the cases.³ Similar principles apply to an imperative power to convey to a trustee to hold upon such a trust as to effect a suspension. But the fact that a remainder is given to a designated person, to vest in possession at a future date, or in case of his prior death to his then living issue, does not necessarily create a suspension, for the meaning may be that the remainder is to vest absolutely in the person named, the reference to the issue being intended to emphasize the fact that they are to take, not as "purchasers" but merely by right of succession to their parent.⁴ Under that construction, the first taker could dispose of the future estate absolutely, and the "issue" would have no independent rights whatever under the original instrument.

¹ *Watkins v. Reynolds*, 123 N. Y. 211; *Miller v. Wright*, 109 N. Y. 194, 200; *Bruner v. Meigs*, 64 N. Y. 506; *Campbell v. Stokes*, 142 N. Y. 23, 29; *Smith v. Floyd*, 140 N. Y. 337.

² *Dana v. Murray*, 122 N. Y. 604, 617.

³ *Campbell v. Stokes*, 142 N. Y. 23; *Moore v. Appleby*, 108 N. Y. 237 (36 Hun, 368); *Knowlton v. Atkins*, 134 N. Y. 313; *Paget v. Melcher*, 156 N. Y. 399; *McGillis v. McGillis*, 154 N. Y. 532, and other cases above cited, many of which illustrate the presence or absence of a suspension, though not any question of undue suspension.

⁴ *Gilman v. Reddington*, 24 N. Y. 9, 16.

§ 285. Thus as in subdivision (b) and in part under subdivision (c) *supra*, cases under this subdivision (d) illustrate the class of suspension treated in Chapter III. Even if, in a given case, and under the foregoing principles, suspension of the absolute power of alienation does exist, yet if it is confined within the statutory period, it is of course not illegal.

(c) Non-Terminable Powers to Sell in Future.

§ 286. Inasmuch as the absence of suspension under certain powers of sale to be exercised in the future only, for designated living beneficiaries, is due to a presumption that the postponement of sale was not intended to actually prevent the beneficiaries, if they preferred, from overriding and annulling the power,¹ it follows that if that presumption is negatived, in the instrument which creates the power, by an express and explicit declaration to the contrary, then the right to override it does not exist, and accordingly a suspension of the absolute power of alienation results.

§ 287. For to the due execution of a power there must be a substantial compliance with every condition required to precede or accompany its exercise, and to this end such exercise must comply with the spirit as well as the letter of the power.² And "except as provided in this article³ the intentions of the grantor of a power as to the manner, time and conditions of its execution must be observed; * * * ." ⁴ And thus, it has been held, the grantee of a power in trust given ex-

¹ See § 265. *Mellen v. Mellen*, 139 N. Y. 210, 220; *Trask v. Sturges*, 170 N. Y. 482, 497; *Lane v. Albertson*, 78 App. Div. 605, 615; *Hetzel v. Barber*, 69 N. Y. 1, 11-12.

² *Harris v. Strodl*, 132 N. Y. 392.

³ See Real Prop. L., §§ 163, 170, 171.

⁴ Real Prop. L., § 172.

plicitly upon condition, and only upon condition, that it shall not be exercised until a future time, cannot exercise it in the meantime, and the beneficiaries cannot annul it, because the presumption that the creator of the power did not intend to confine them strictly to taking the property in its converted form only, is destroyed by the explicit expression of a contrary design. And if the term during which the absolute power of alienation is thus suspended is not duly measured by lives in being, the entire power is void.¹

§ 288. "The time when the power is to be executed may be material to its validity. There are no means by which alienation can be suspended beyond the period prescribed in the first article; and we shall find, I think, the same difficulty on that point, when the case is examined under the doctrine of powers, that was presented when considering it as an express trust under the 55th section. The power can only be executed at the time and in the manner prescribed by the testator. * * * [*Hillen v. Iselin*, 144 N. Y. 365, 373]. By the will the final distribution is to be made and the conveyances executed 'at the expiration of the period herein prescribed for the continuance of the trust.' It can only be done when all the minorities shall have ceased; and if no one can in the meantime convey an absolute fee in the land, then we have already seen that the power of alienation is suspended for a longer period than the statute allows. * * * What kind of a fee can be conveyed so long as a power exists by which it may be utterly defeated? It surely is not an absolute

¹ *Matter of Butterfield*, 133 N. Y. 473 (59 Hun, 153, *sub nom.* *Matter of Christie*); *Hetzel v. Barber*, 69 N. Y. 1, 12; *Beckman v. Bonsor*, 23 N. Y. 298, 317; *Blanchard v. Blanchard*, 4 Hun, 287, *aff'd* 70 N. Y. 615. See also *Haug v. Schumacher*, 166 N. Y. 506, 512; *Buchanan v. Tebbetts*, 69 Hun, 81; *Smith v. Farmer Type Founding Co.*, 16 App. Div. 438.

fee. The power by which the new estates are to be created cannot be released or in any way destroyed." Bronson, J., in *Hawley v. James*.¹ To the same effect is the decision in *Hone's Executors v. Van Schaick*.² In both these cases, the suspension was held to arise out of the particular provisions of the wills in hand, rendering imperative a sale at and not before a future date not limited by two lives.

§ 289. An unlawful restriction upon the exercise of a power of sale during a term not measured by two lives in being, cannot be cut out of a testamentary scheme and disregarded, in order to save the power itself, where the power as given is explicitly made conditional upon its non-exercise during more than two lives in being, and where its elimination would destroy the general scheme of the will and frustrate the testator's general purpose.³ But if its elimination would not produce such a result, then it may be cut out and disregarded.⁴ Here also should be considered the class of cases suggested by Professor Reeves,⁵ of a powers of appointment or disposition granted to a person not yet in being.

§ 290. But it is now necessary to notice that the general drag-net prohibition formerly contained in 1 R. S. 723, § 15, to the effect that "the absolute power of alienation, shall not be suspended by any limitation or condition whatever," beyond the statutory period, has been omitted from the Real Property Law, § 42, which now seems, so far as its own mere phraseology goes, to deal only with such suspension as is occasioned by

¹ 16 Wend. 61, 175.

² 20 Wend. 564.

³ Matter of Butterfield, 133 N. Y. 473.

⁴ Haug v. Schumacher, 166 N. Y. 506, 512, 514.

⁵ 2 Real Property, § 966.

future estates. This subject is discussed, in another connection, in preceding sections.¹ The omission of the drag-net prohibition renders it difficult to deal with the class of cases now under consideration. If in any given state of facts such a power of future disposition may be said to exist for the purpose of effecting the creation by its exercise, of a future estate, so that the possible postponement thereof beyond the statutory period would render such potential estate itself void, and so, by indirection, invalidate the power which existed only to effectuate its creation, it might of course be said, in a sense, that the power attempted an illegal postponement.² In the present state of the law, the governing principles in this field are somewhat obscure.

§ 291. Unlike the cases covered by subdivisions (a), (b), (c) and (d) *supra*, those covered by this subdivision (e) may illustrate a class of suspension which is caused solely by the existence of the power and the prohibition of its exercise until a future time, and not at all by the existence of any express trust or contingency.

§ 292. The foregoing instances of suspension by powers or in direct connection with powers, are given as illustrative examples, and not as necessarily constituting a complete list of all the cases within the class.

Powers that Obviate Suspension.

§ 293. A suspension of the absolute power of alienation which would be occasioned by certain provisions of an instrument, if considered by themselves alone, may sometimes be obviated by an accompanying provision creating a power. For instance, an express trust of the third class, to receive and apply rents and profits,

¹ §§ 222-237.

² See Real Property Law, § 179.

if considered by itself, effects a suspension. But if the instrument also confers upon the trustee an unrestricted power to convey the real property, free from the trust, there is obviously a person in being by whom an absolute fee in possession can be conveyed, and therefore, so far as concerns the real property affected by the power, there is no suspension.¹

The " Statutory Period " as to Powers.

§ 294. By § 178 of the Real Property Law it is provided that " The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power, must be computed, not from the date of such instrument, but from the time of the creation of the power." ² " The time of the creation of the power " means, in case it was created by will, the death of the testator, and in case it was created by deed, then the time of the conveyance creating the power.³

§ 295. For the purpose, as would appear, of establishing some convenient specific formula for the actual application of this statutory rule, the courts have frequently stated the terms of § 178 in other language, sometimes in one form, and sometimes in another. Some of these statements adhere very closely, in substance, to the terms of the statute. Thus in *Hillen v. Iselin*,⁴ it is said that " It is well settled that the time of the suspension of the power of alienation, where ap-

¹ See § 42 *et seq.*

² *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266; *Matter of Harbeck*, 161 N. Y. 211; *Mott v. Ackerman*, 92 N. Y. 539, 549; *Dana v. Murray*, 122 N. Y. 604; *Genet v. Hunt*, 113 N. Y. 158, 169. So also as to personal property. *Fargo v. Squiers*, 154 N. Y. 250; *Matter of Pillsbury*, 50 Misc. 367; 113 App. Div. 893, and 186 N. Y. 545.

³ *Hillen v. Iselin*, 144 N. Y. 365, 378. See *Real Prop. L.*, § 179; also *id.* §§ 131, 144, 151.

⁴ 144 N. Y. 365, 378.

pointments of future estates have been made under a power, which are claimed to be void for remoteness, is to be measured from the death of the testator, or, in the case of deeds, from the time of the conveyance. For the purpose of determining whether there has been an unlawful suspension of the estates created under a power, they are considered as having been created when the will or deed took effect." And in *Beardsley v. Hotchkiss*,¹ it is said that "we must go back to the date of the ante-nuptial contract [which created the power there in question] and see if, computing from that date, there has been an illegal suspension of the absolute power of alienation * * * ." But in other statements of the rule, a different formula has been laid down. This formula is, that the validity of the term must be tested by reading the provisions into the instrument by which the power was created,² as if they had been actually incorporated therein at the time of its execution.³

§ 296. Thus under both formulas the term of a suspension occasioned by the provisions of the later and subsidiary instrument, like the term of any suspension occasioned by the provisions of the earlier, is to be computed from the time of the creation of the power; and the difference between the two tests is found in the fact that while the first leaves the two instruments to be contemplated as still separate, though co-operating, when the power has in fact been exercised, to produce a total joint scheme of disposition, the second contemplates the provisions of the later instrument as if they

¹ 96 N. Y. 201, 214.

² *Fargo v. Squiers*, 154 N. Y. 250, 259; *Tweddell v. New York Life Ins. Co.*, 49 App. Div. 258, 262, aff'd 166 N. Y. 608.

³ *Maitland v. Baldwin*, 70 Hun. 267, 270; *Genet v. Hunt*, 113 N. Y. 158, 168, 170; *Matter of Harbeck*, 161 N. Y. 211, 218, 220.

had been originally incorporated bodily into the earlier, thus putting the case as if there were only one instrument to be considered, containing in itself a complete and final scheme of disposition matured and announced as an entity from the beginning.

§ 297. As applied to most cases to which the statutory rule relates, this "reading-in" formula is undoubtedly correct, and the employment of it would lead to the same result as would the use of the statutory rule for measuring the period merely by computation "from the time of the creation of the power." But it is believed that there is at least one class of cases where the use of the "reading-in" formula would lead to a different and incorrect result. The rule relating to these exceptional cases may be summarized as follows: Where of two instruments, the one creating a power of disposition and the other exercising it, the former by its own terms occasions a suspension for one life and the latter attempts by its own terms to occasion a suspension for two lives, in being at the creation of the power, and the result of incorporating the provisions of the later into the earlier would be to eliminate from consideration the provisions which occasion the suspension under the earlier instrument, the reading-in formula is inapplicable.¹

§ 298. "An estate or interest can not be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power."² If however, the provisions of the instrument which creates

¹ A full discussion of this subject will be found in 10 Columbia Law Review, 495.

² Real Prop. L., § 179; also id. §§ 42, 131, 144; Genet v. Hunt, 113 N. Y. 158; Fargo v. Squiers, 154 N. Y. 250.

a power are such that the grantee of the power, by force of Real Property Law, §§ 149-153, becomes thereby automatically vested with an absolute fee,¹ it seems that the power as such disappears, and the owner of the fee, if he aliens, does so as owner, and not as grantee of the power; and therefore the period of any suspension effected by his deed or will is to be computed from its own date, and not from that of the creation of the power.²

¹ See *id.* § 151. *Matter of Mochring*, 154 N. Y. 423, 427.

² *Cutting v. Cutting*, 86 N. Y. 522, 536; *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266; *Deegan v. Wade*, 144 N. Y. 573, 577-8; *Hume v. Randall*, 141 N. Y. 499; *Freeborn v. Wagner*, 2 Abb. Ct. App. Dec. 175, 183; *Crooke v. Co. of Kings*, 97 N. Y. 421, 435; *Weinstein v. Weber*, 178 N. Y. 94, 100; *Wendt v. Walsh*, 164 N. Y. 154, 159; *Ackerman v. Gorton*, 67 N. Y. 63; *Matter of Gardner*, 140 N. Y. 122; *Taggart v. Murray*, 53 N. Y. 233; *Woodbridge v. Bockes*, 59 App. Div. 503, *aff'd* 170 N. Y. 596; *Coleman v. Beach*, 97 N. Y. 545; *Swarthout v. Ranier*, 143 N. Y. 499; *Rose v. Hatch*, 125 N. Y. 427, 433, and cases cited; *Ryder v. Lott*, 123 App. Div. 685, 199 N. Y. 543; *Hasbrouck v. Knoblauch*, 130 App. Div. 378; *Genet v. Hunt*, 113 N. Y. 158, 166, 168, 170.

If a given suspension is occasioned not by an instrument in execution of a power, but by the existence of the power to execute such an instrument, the authorized term is still governed, directly or indirectly, either by Real Prop. L., § 42, or by *id.* §§ 178-179.

See the following as to a devise or bequest to one, with remainder over, of "what may remain" at the death of the first taker. *Seaward v. Davis*, 198 N. Y. 415; *Crozier v. Bray*, 120 N. Y. 366; *Van Horne v. Campbell*, 100 N. Y. 287; *Norris v. Beyea*, 13 N. Y. 273; *Wager v. Wager*, 96 N. Y. 164; *Terry v. Wiggins*, 47 N. Y. 512; *Smith v. Bell*, 6 Pet. 68; *Colt v. Heard*, 10 Hun, 189; *Greyston v. Clark*, 41 Hun, 125; *Wells v. Seeley*, 47 Hun, 109; *Leggett v. Firth*, 53 Hun, 152, and 132 N. Y. 7; *Kelley v. Hogan*, 71 App. Div. 343; *Campbell v. Beaumont*, 91 N. Y. 464; *Matter of Gardner*, 140 N. Y. 122; *Rose v. Hatch*, 125 N. Y. 427, 433; *Tuthill v. Davis*, 121 App. Div. 290; *Oxley v. Lane*, 35 N. Y. 340, 348; *Jones v. Jones*, 66 Wis. 310; *Swarthout v. Ranier*, 143 N. Y. 499; *Smith v. Van Ostrand*, 64 N. Y. 278; *Bliven v. Seymour*, 88 N. Y. 469, 478; *Crain v. Wright*, 114 N. Y. 307; *Haynes v. Sherman*, 117 N. Y. 433; 2 *Reeves*, Real Property, § 903, note (a) and § 954.

CHAPTER VI.

POSTPONEMENT OF VESTING.

RULE II. VESTING.

Historical.

The General Statutory Scheme.

"Remainders."

"Within" the Statutory Period.

"Must Vest." "If Ever."

Must Vest "in Interest."

SOURCES OF RULE II.

Remainder on a Fee.

Remainder on an Estate for Life.

Remainder on a Term of Years.

Remainder on Estate in Trust.

Remainder on Execution of Power.

Remainder in Default of Appointment.

Remainder to a Class.

THE STATUTORY PERIOD FOR POSTPONEMENT.

§ 299. **Rule II.** ESTATES IN REMAINDER SHALL BE SO LIMITED THAT WITHIN THE STATUTORY PERIOD, IF EVER, THEY MUST VEST IN INTEREST.

This Rule, as already set forth in the first chapter, differs from Rule I in this: Rule I, applying to all estates and interests, present and future, calls for alienability by the end of the "statutory period," and calls for nothing more. If all the estates and interests, actual and potential, are alienable, so that an absolute fee in possession can be conveyed, there is no infraction of Rule I. Rule II, on the other hand, applying only to what it refers to as "remainders," requires that in addition to being alienable they shall also be so limited that they will certainly vest, if ever, by the end of the "statutory period."

Now the view has been advanced by some writers, that there is no such general principle in the law of New York, as that embodied in Rule II, and that the only general rule in this field is found in the statutes represented by Rule I, and is confined to the subject of alienability only.

Historical.

§ 300. This view that there is no such Rule, appears, at least in part, to be based on the supposition, hereafter considered, that at the time when our Revisers were framing, and the Legislature enacting, the sections of the Revised Statutes which deal with these matters, it was, or at least was still generally supposed to be, the common law, that the established Rule against Perpetuities was confined to the requirement of absolute alienability, and that it was only later that it came to be recognized by the English courts that the Rule had a relation to required vesting of future estates. Accordingly, the argument appears to be that the Revisers, presumably having the then accepted view of the law in mind, must have intended to confine their propositions likewise to the field of alienability only, and that thus the statutory provisions, now found in the Real Property Law, which seem to have any bearing on the subject of the necessity of vesting within the statutory period, are to be understood as intended, and as operating, solely to attain some other ends, and not to require such vesting at all.

Now it is believed, as fully set forth in the first edition of this book, twenty years ago, that the statutes of New York do fully establish the proposition embodied in Rule II, in addition to that embodied in Rule I. In order to hold this latter view, it is not necessary to determine just when it was that the English Rule against

Perpetuities came to be generally recognized as a rule relating directly to vesting. For one thing, as will be seen later, the whole *subject* of the enforced vesting of future estates, was a matter of general investigation and study, both here and abroad, in the period which included the preparation of our Revision, and what the English courts worked out, at least soon after that time, without the aid of legislation and so upon the theory that it had always been the law, may conceivably enough have presented itself in the same light to the minds of our learned Revisers, and have been adopted by them, on that theory and in modified form, in their draft. And if, on the other hand, it were clear that they looked on the Rule against Perpetuities, as then existing, as one having no concern with the subject of vesting as such, it is also conceivable that they may have thought it capable of improvement by new provisions on that subject. They never hesitated to propose desirable modifications in any field, and the statutes they drafted are full of provisions changing the earlier law.

The suggestions they did in fact make with reference to the vesting of "remainders," and the provisions they drafted with that end in view, the Legislature enacted. That these sections make up a general Rule, under which all remainders, to be valid, must be so limited that they will certainly vest, if ever, by the end of the statutory period, is a proposition recognized by a series of important adjudications. In view of the nature of the relationship¹ between our present law in New York, and that which existed prior to the time of our Revision, it would not be appropriate, for the purposes of this volume, to attempt any detailed examination of the earlier law, in order to ascertain from a

¹ *Supra*, § 15.

present point of view what the law in that field then actually was. But what, on the other hand, it was currently thought to be, in general outline, as set forth by those who wrote on the subject prior to the time of our Revision and, with reference to that time, during some few years thereafter, may be profitably examined for any light that may thus be thrown on the codification, with changes, which was prepared by our Revisers. Within these boundaries, therefore, the statement which occupies the following sections, from § 300 *a* to § 301 *g*, has been confined, and no attempt has been made to pass upon the merits of the several views and arguments concerning the exact origin and precise form of the common law Rule against Perpetuities. The direct discussion of the New York law as such, is resumed in § 302.

§ 300 *a.* In the earlier days, then, of the English law, there was, in any strict sense, no rule against perpetuities. For in connection with the forms of disposition then in use, and the general impracticability of limiting a remainder upon a fee, or a contingent freehold remainder upon a term of years,¹ and the facility with which estates tail, and remainders limited thereon,² or on a life estate, could be barred, there was no special occasion for any such rule.³ Such needs as were then felt, for protection against what were regarded as the most objectionable forms of ordinary effort to obstruct

¹ II Reeves, Real Property, § 901; Gray, Perpetuities, 2nd Ed., §§ 191-192.

² Fearn, Con. Rem. 423; Williams on Real Prop., 17th Ed., 107 and 433, note.

³ Thus the fact that at that time the interests represented by contingent remainders, as later by various forms of executory limitation, could not, while the vesting remained doubtful, be directly transferred (though by indirection similar results could be attained), was considered harmless. Lewis, Perpetuities, Supp. 14.

the free and advantageous ownership, enjoyment and employment of property, were supplied, in addition to the principles already mentioned, by various rules, the actual soundness of some of which has since been generally denied. Illustrations of such principles are to be found in the restrictions against remainders, after a grant to an unborn person for life, to that person's children, or in Lord Coke's rule against a "possibility on a possibility."¹ Opinions of distinguished writers on the common law differ concerning the exact relation of this earlier state of the law, with its own forms of protection, established or tentative, against its own probable dangers, to the later rules which were slowly formulated to meet new conditions, as new forms of executory disposition, to which the old safeguards did not apply, came to be recognized by the courts. These matters are very fully and clearly discussed in the works of Sugden, Humphreys, Hargrave, Lewis, Williams and Challis.

§ 300 *b*. Mr. Lewis, whose admirable "Treatise on the Law of Perpetuities, or Remoteness in Limitations of Estates" under the English law was published in 1843, after giving a valuable exposition of the growth of the law says: "Thus have we traced the gradual progress of the rule of law, on the subject of remoteness of future executory limitations, from the Reign of James I, in which the case of *Pells v. Brown*, (Cro. Jac. 590; 1 Eq. Abr. 187, c. 4) occurred, down to the year 1833, when the case of *Cadell v. Palmer* (7 Bligh N. S. 202) was decided. We have seen the limits of the rule now extended, and now contracted, according to the nature of the judges' notions of—*convenience*, (Lord Nottingham's unerring pole-star for the guidance of

¹ Lewis, Perpetuities, Supp. 97-107; Gray, Perpetuities, 2nd Ed. §§ 288-294.

the judicial mind!); at one time they have now received extension by mere operation of law; at another, they have oscillated uncertainly, between conflicting constructions of the very terms in which they have been defined; until, at last, and by imperceptible degrees, two centuries of doubt and argumentation have enabled judicial wisdom, (unaided by Legislative interposition), to frame and complete that important article in our jurisprudential code, known by the name of the '*Rule against Perpetuities.*'"¹

§ 300 c. Now as applied to the period when our Revision was drafted and enacted, and as bearing on what it probably was that the Revisers were attempting to accomplish in this field, there have been, or have been said to be, at least three theories concerning the nature of the Rule against Perpetuities, as follows:

(1) That what the Rule required, by the end of its established period, was alienability, and nothing else. In support of this proposition it has been said, by some writers, that the great authority of Sugden may be cited.²

(2) That what it required was vesting, and nothing else.³

(3) That what it required was that the estate in question should *either* be vested *or* be subject to destruction at the option of the owner of some estate that was vested. This is the view of Lewis,⁴ of Marsden,⁵ and of Challis.⁶

¹ Lewis, Perpetuities, 161.

² Cole v. Sewell, 4 Dr. & Warr. 1, 28; Sugden's note to Gilbert on Uses, p. 119.

³ This supposed view seems to have been sometimes attributed to Lewis, and Marsden. But see the next subdivision, (3).

⁴ Perpetuities, 164.

⁵ Perpetuities, 2, 165.

⁶ Real Property, 2nd Ed., 159, 168-171, 185. See quotation, *infra*, § 301 g, and §§ 300 d, 301 c, 301 e.

There is also a view, to be classified, perhaps, under (2) or (3) above,

This statement of different views, in a rough general form, is set forth here, for one reason, to call special attention to the manner in which, from a period prior to our Revision, as shown by citations in later sections, the changes have been rung, in connection with statements of the Rule, first on vesting and then on alienability, and then on vesting again, and then, while future estates were destructible, on their destructibility. Another reason for dwelling on the classification is to show, with reference to those who, like Mr. Lewis and Mr. Marsden, hold what might be called the *vesting or destructibility* view, that their arguments cannot be met by classifying their view under (2) as in favor of vesting only, and then presenting, as opposed thereto, cases where destructibility satisfied the Rule. That is what those writers say.¹

Mr. Lewis, whose work on Perpetuities was published less than fifteen years after the date of adoption of our Revision, states, as applied to a period extending back further than that date, that the Rule was not satisfied by alienability through a concurrence of the owners of vested and contingent estates, but required that future limitations, whether executory or by way of remainder, and of either real or personal property, must, to be valid, *either* be limited to vest, if ever, by the end of the period contemplated by the Rule, *or else* be such that the persons entitled for the time being to the property which was subject to the future limitations could themselves effect the destruction of the future limitations, at their own option, without any need of the con-

that the Rule simply did not apply at all to future dispositions that were either vested or destructible, because they had no need of it, and therefore furnished nothing for the Rule to act on. Compare § 300 *d, infra*.

¹ Professor Gray's special view is set forth in his Rule against Perpetuities, 2nd Ed., § 204.

currence of the individuals interested thereunder.¹ This matter is more fully discussed in later sections.

§ 300 *d.* There have also been statements from very high authorities, that the Rule against Perpetuities never had anything to do with remainders, in any event. This view is rejected by other learned writers, and it may be that the difference of opinion is due, at least in part, to a mere difference in terms and definitions.² The existence of the view referred to is of interest for its possible bearing upon the form of the provisions adopted by our Revisers.

§ 300 *e.* We have, therefore, for brief consideration, as applied to the time of our Revision, the subjects of alienability and of vesting, and in connection therewith the subject of the former destructibility of future estates, as an element of the Rule against Perpetuities. And it is to be noticed that whatever the differences in forms of statement, it is undoubted that the Rule did aim, for at least one of its main purposes, at the freedom of control and disposition represented by alienability, and also that it recognized as at least one means to that end, the feature of vesting. Thus it is natural that some statements of the Rule should appear to dwell on alienability, without pausing to distinguish between mere alienability in whosoever hands existing, and alienability solely by owners already vested with title or able to become vested at their own option.

¹ Lewis, *Perpetuities*, 164. Marsden, *Perpetuities*, p. 2, accepts this definition of Mr. Lewis as satisfactory. Also *id.*, p. 165; Challis, *Real Property*, 168-171.

² Challis held this view. *Real Property*, 159. As he apparently placed it on the ground, similar to that mentioned in § 300 *c*, *supra*, that it did not apply because there was no need for it, the whole matter being sufficiently covered by other principles, his position was entirely consistent with his other view that the Rule required either vesting or destructibility. See *infra*, §§ 301 *b*, 301 *c*. Also Lewis, *Perpetuities*, Supp., 97-153.

Other statements are more explicit on these points, and while confining the Rule to alienability through vested owners, recognize its purpose as extending beyond the attainment of mere alienability to reach cases of contingent though alienable interests, because they tend to clog or obstruct, even though not to actually prevent, the free control represented by alienability through absolute vested ownership.

§ 300 *f*. In 1822, in England, Mr. Henry Randell published a brief essay on Perpetuities. He says, on page 88, that the principle of the Rule extends only to cases "where estates are so limited that the power of alienation is taken away." That remark might be classified under view (1) or view (3) above.¹ He does not there explain the sense in which he uses the term "power of alienation," but on pages 48 and 49, he had already defined a perpetuity as "any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being," etc., and added that "it is not sufficient that an estate *may vest* within the time allowed, but the rule requires that it *must*."² This essay of Mr. Randell is not mentioned in the Revisers' Notes. They do, however, refer to the Law Tracts edited by Mr. Hargrave and published in 1787. One of these, beginning at page 513, contains an illuminating statement of that writer's views on the early establishment of the principle of law that a strict entail could be destroyed after the life of the tenant for life in possession and the attainment of majority by the first issue in tail; that when executory devises came in, similar methods of restriction were needed; that by analogy it was at length settled in the form of a similar but not identical rule, that the longest period for *vesting*

¹ § 300 *c*.

² Italics not in original.

of an executory devise should be any life or lives in being and twenty-one years after, with allowance for the period of gestation. These observations Mr. Hargrave repeated in 1798 in his argument in *Thellusson v. Woodford*.¹ In 1842, in his Treatise on the Thellusson Act, § 57, he puts the same matter thus: "The rule against perpetuities fixes the period during which the vesting of a valid executory devise or springing use may be postponed." In 1831, Mr. Hayes published in London a work, not mentioned by the Revisers, on real property, in which² he refers to the Rule against Perpetuities in terms which instead of implying the sufficiency of any kind of alienability to satisfy it, appears to dwell on the likelihood of interference with free handling of property by owners as one of the matters to be controlled.

§ 300 g. Fearne, whose work on Contingent Remainders the Revisers refer to, rests the Rule³ which required executory devises to take effect "within a short space of time," upon "the privilege of executory devises which exempts them from being barred or destroyed." He says, that otherwise it would be within a testator's power to limit an estate so as to make it unalienable for generations to come, for "every executory devise, so far as it goes, creates a perpetuity, that is, an estate unalienable till the contingency be determined one way or another." The illustration given by Fearne,⁴ is a limitation to A in fee, and upon failure of A's issue at any time, to B, a living person, as showing a provision void for remoteness, as to B.⁵

¹ 4 Ves. 227; 11 Ves. 112; Juridical Arguments, Vol. II, p. 62 (London, 1799).

² Page 79, note.

³ 4th English Ed. (1791), pp. 314, 315; 8th English Ed. (1826) p. 430.

⁴ Id.

⁵ See § 301 c, *infra*.

Also to the same effect Marsden Perpetuities, 51. Butler's note to

§ 300 *h*. Another work to which the Revisers refer in their Notes, and from which, as they state, they drew in substance some of their proposed statutory provisions, was published, in England, in its second edition, in 1827, by Mr. Humphreys. Brougham, in his famous speech in Parliament, published in London, in 1827, as “Observations on the Actual State of the English Laws on Real Property; with Outlines for a Systematic Reform,” and also mentioned by the Revisers, pays a high tribute to the work of Mr. Humphreys; and the Revisers acknowledge their special indebtedness to him. Mr. Humphreys¹ reviews the law of estates tail, and the way in which they had gradually become “extendible” into a fee simple and capable of alienation “in particular cases and modes;” the growth of springing uses, and executory devises, and their limitation to lives in being and a further allowance in case of infancy, by “an alleged analogy to settlements by entail,” with variations.²

§ 300 *i*. With the facts already stated in mind, the bearing of the then existing law, and of Mr. Humphreys’ proposed changes in it, upon the form and meaning of our Revision are apparent. Thus in one place,³ in speaking of the law of powers, as it then stood, and with reference in particular to perpetuities, he dwells both upon *alienability*, and upon *vesting* as a means of obviating undue protraction of inalienability.

Fearne, 562 (h) subd. II, explains that in fixing a boundary beyond which executory limitations should not be permitted to operate, the courts proceeded by analogy to the existing legal effect of settlements limited to one for life, remainder to his children in tail. This is the generally approved view. Fowler, *Real Property Law*, 3rd Ed., p. 265; Reeves, *Real Property*, 2nd Ed. § 956. The Revisers expressed their adherence to it, in their Notes.

¹ *Real Property*, Part I, Title III, Chap. II, p. 31 *et seq.*

² See also Brougham’s Speech, London, 1828, Edition of Henry Colburn, p. 54.

³ Title IV, Chapter I, sect. 6, p. 97-8.

§ 300 j. And in Part II of his work, devoted to "Suggested Remedies for the Defective State of the Laws of Real Property," Mr. Humphreys sets forth the following, numbered 51, as a general suggestion for statutory enactment: "Land, or any profits thereof, may be aliened, either in possession, or to take effect on the death of the donor, or of any third person, who may actually have, or may acquire a life interest therein, either by prior title or under [Mr. Humphreys' preceding] Art. 49, to any person or class of persons, who may be living or be conceived, when the disposition shall vest in possession. Any such interests may either be absolute, or may be rendered defeasible, if the donee or donees shall die under the age of twenty-one years; or on the happening of any other event before his or their attaining that age; or with reference to whom any event shall or shall not happen before that period. Alternative dispositions are allowed of land, to take effect if any limitations under this article shall fail to vest absolutely; but all such dispositions to take place after the absolute vesting of any such preceding limitations, or beyond the period within which the same are confined, are utterly void." And in proceeding to explain this suggested form of enactment, Mr. Humphreys says:¹ "Article 51 is framed with a view to correcting and defining the terms of the more modern mode of settlement by executory disposition. The abuse at present practiced of protracting the power to aliene by means of mere nominees, unconnected with the estate, is prevented by Art. 49, which regulates the disposition of life interests, and by the article now under discussion, which confines *all present or future interests*² within the *true* limits of our existing law of executory dispositions." The alternative dispositions provided for in

¹ Page 285.

² Italics not in the original.

Art. 51 "may be repeated to any number of donees in existence and their respective issue; ever observing the rule, that the land must vest absolutely in any issue unborn when the instrument takes effect, on its attaining twenty-one; and thus all the subsequent limitations will be defeated."

§ 301. Passing from the works published prior to the time of the Revision, and thus available for the study of the Revisers, to those issued not long thereafter and undertaking to state the law concerning the period in which the Revision was adopted, we find that the Commissioners whose appointment to inquire into the law of England relating to real property was referred to by our own Revisers in their Notes, were then preparing and submitting their Reports. Without the need of holding too closely to the literal meaning of their words, it is certain that they use phraseology which would at least suggest the subject of the necessity of vesting, as where they say in their Third Report,¹ that "the rule requires that it should be absolutely certain that the estate should *vest* within the proper period;" and in their appended "Propositions" they lay down proposed formulations of rules for "the period during which the *vesting* of a future estate or interest * * * may be suspended," including one that "every such future estate or interest which shall not be made to *vest* within that period shall " with exceptions, be void; and that "a contingent remainder or other future estate or interest, the *vesting* of which shall be suspended during a life or lives arbitrarily taken for the purpose of such suspension, shall be void," and, "that a power so made that it may be exercised at any time beyond the period allowed for suspending the *vesting* of a future estate * * * shall * * * be void," and so on through

¹ Submitted subsequent to the Revision. Italics not in original.

many separate propositions each dwelling on the desirability of insisting upon vesting by the end of the authorized period.

§ 301 *a.* The treatise of Mr. Lewis (1843) which has already been referred to was, with what in apparent reference to Mr. Randell's Essay Mr. Lewis calls "one inconsiderable exception," the first ever published (apart from works on other general subjects which contained brief allusions to the topic), upon the Rule against Perpetuities. The remarks of its very learned, accurate and able author, show in themselves, as do those of the earlier writers already referred to, and quite apart from any question of the intrinsic merits of their views, that throughout the general period during a part of which our Revision was under preparation, the topic of the dangers incident to contingent estates if not subjected to proper restrictions and limits, was under active discussion.¹

In 1844² a statute was enacted which attempted to get rid of contingent remainders by forbidding their further creation, or turning them into executory limitations. Later this act was repealed³ as from the time of its taking effect.⁴

In 1849, Mr. Lewis published a Supplement to his work on Perpetuities, in one chapter of which he considers the two subjects of alienability as such, and of vesting, being the matters which our Revisers, some

¹ The final closing of the terms of the Rule, to which Mr. Lewis refers in words quoted above in § 300 *b*, he places at 1833, only three or four years after that enactment. Cf. Fowler, *Real Property*, 3rd Ed. p. 266. The case then decided, operated to define certain features relating to the limits of the term allowed, but did not change the previously accepted definition and scope of the Rule.

² 7 & 8 Vict. c. 76.

³ 8 & 9 Vict. c. 106.

⁴ Lewis, *Perpetuities*, Supplement, Chapter VI.

twenty years prior to that time, had dealt with in a different manner and in distinct statutory provisions embodied in our Rule I, requiring alienability, and Rule II, requiring vesting, by the end of the statutory period. What he there said is of general interest, by way of analogy, and in several respects of contrast, in connection with our own somewhat similar statutory scheme.

§ 301 *b*. “The object of the inquiry,” he says, “which formed the subject of this chapter, was to trace out the circumstances which first manifested the necessity for a rule, restraining within reasonable limits the remoteness of executory limitations, and were consequently the cause of its introduction. This investigation established that the doctrine of the indestructibility or indefeasibleness of *executory limitations*, was the immediate producing cause of the Rule against Perpetuities. * * * there is nothing in this conclusion at all incompatible with the doctrine maintained in that chapter, that *contingent remainders* are within the Rule against Perpetuities.¹

“Statutes have recently been passed² to enable persons entitled to contingent and executory interests in land, or interested under contingent or executory limitations of land, to alienate and dispose of those interests, so as to make the disposition valid and effectual at law, which, by the rules of the common law, could not be. And it becomes important to consider whether this alteration of the law at all affects the stringency, or contracts the scope of the Rule against Perpetuities, the provisions of which are designed to promote and to secure freedom of *alienation*. * * * We find, then, that the law now recognizes a general unlimited power of

¹ See *In re Ashforth*, L. R. (1905) 1 Ch. Div. 535.

² 7 & 8 Vict. c. 76, s. 5; 8 & 9 Vict. c. 106.

alienation, by instrument *inter vivos*, over future interests in land of all sorts, not being mere expectancies or hopes of succession dependent on an unaccrued title or character. * * * [And by 7 Wm. 4, and 1 Vict. c. 26, s. 3 the] power of disposing by will may be considered substantially co-extensive with the power of alienating by deed, given by the subsequent statutes, to which reference has already been made. * * * It is obvious to remark that the limitations, the creation of which it has been and is the object of the Rule against Perpetuities to confine within definite limits, are the very same class of interests which, when created, were for the most part (as above sketched) inalienable by the rules of the common law. * * * The coincidence is interesting and worthy of observation, even though we should not be able to conclude that the rule against Perpetuities was a direct *emanation* of the old doctrine of the inalienability of contingent interests. * * * If all contingent and executory interests in land are now become alienable both by deed and will, whereas formerly they were (as a general rule) not alienable at all, it is (to say the least) a pertinent question, whether the Rule against Perpetuities—a rule which was provided specially for the regulation and control of contingent and executory interests and which applies to nothing else—proceeded or was grounded upon a consideration of their inalienability, or any imperfection proximate to that. It may or may not be a notion which we receive with respect, or to which we attach consequence, but, to account for the introduction of a notice of it here, the remark may be made, that such an impression has in some quarters existed.

§ 301 c. “The question touches upon nothing less than the true meaning and occasion of the rule against remoteness.¹ By that rule the law says in substance: No

¹ See *supra*, §§ 20-28; 31-37; and *infra*, § 313.

estate or interest shall be so limited as not to vest, or not certainly (if at all) to vest, within the compass of a reasonable period, which reasonable period the rule then proceeds to determine and mark out. The object of this rule is, to protect the inheritance from being disturbed and ripped open by contingent gifts of remote possibility. The law desires that each settlement should become absolute and final in its dispositions of the settled subject within the reasonable period which it defines. Whatever remains uncertain and in contingency affecting the ownership, clogs the alienation and free disposition of it. The policy of the law is satisfied if estates and interests become vested or fixed within the specified limits, because then a period is put to all uncertainty as to where the ownership resides; there is then a point at which all parties interested under the settlement may ascertain and finally determine their position, without the chance of subsequent intrusion or alteration. The policy of the rule is not satisfied merely by a conjunction of limitations which admits of the possibility of an early or even an immediate alienation of the whole estate by the concurrence of the several persons interested under them, although it is true that, in requiring an early vesting of limitations, the law has regard to the fact that, as the result of that vesting, the beneficiaries will be enabled, by concurring in an assurance, to dispose of the whole interest, and so set free the inheritance. If a limitation were indefinitely or remotely contingent or executory, it would not be a circumstance to exempt it from the reason of the doctrines, that it was a limitation to a living person, in a manner or by a form which would enable him forthwith (having regard to the altered state of the law) to alienate such contingent or executory interest, or, by joining in an assurance with the owner of the prior estate, to dis-

charge the property from such contingent or executory interest.

“The objection would still exist, that the settlement was clogged with provisions for indefinite occurrences, and that the primary objects of the settlement were compelled to arrange with those who had contingencies only and no interest, in order to effect a complete disposition of the settled land. It is not capacity to alienate each separate executory interest which satisfies the doctrine, but capacity of alienation of the entire thing resulting from a final vesting of determinate and unfluctuating estates in that thing. The law proposes to itself as a distinct and simple object, that no land shall, by deed or will, be subjected to a complication of ownership, which can cause a new right to arise under it after the lapse of a reasonable period. It contemplates also that, as a general result of carrying out this its primary and definite purpose, the alienation of the land will, at the expiration of the reasonable period in question, be attainable by the joint act or consent of those who have then acquired independent and determinate interests as the certain objects of the settlement.

§ 301 *d.* “It may be said that, whenever the contingent or executory limitation is made to an actual living person, he has it in his power (since his interest under that limitation is now alienable), at any time after the execution of the settlement to enable the other persons interested to convey the property away, and that, consequently, such a case does not at all, in substance, differ from the case of a vested remainder postponed to a long term of years, or to some other estate which may not determine until a remote period, where, although actual enjoyment under the remainder is very distant, and although without including it no disposition of the property can be effected, yet the person entitled to the re-

remainder has it in his power to disencumber the inheritance. But the answer is amply sufficient to this suggestion, that it disregards the essential distinction between interests which are uncertain and may never take effect, and those which enter into and form an integral portion of the single existing ownership. This is precisely the distinction which the law enforces; it objects to indefinite contingencies being imported into the scheme of the settlement, to fetter and intercept an enjoyment, which would otherwise be free and unqualified; and it cannot therefore, be an answer to say that, by arrangement and contract, such an indefinite contingent or executory gift may be got rid of, or made to assist in the free alienation of the land.

“Moreover, the important fact is lost sight of in arguments of this kind, that the remoteness which affects the prospect of actual enjoyment in the case of the vested remainder, is remoteness coincident merely with the duration of some actually subsisting estate recognized by the law, whereas the remoteness of an executory gift or contingent remainder (even though limited to a person who may immediately alienate it), is a capricious remoteness not representing the termination of one subsisting estate, and the commencement in possession of another, but suspended arbitrarily as a contingency to preclude finality in the working of the settlement. When it is remoteness merely in the prospect of *enjoyment* resulting simply from the fact of the *previous* limitation of an actual effective interest which the law recognizes, and corresponding to the natural limits and duration of that interest, it would be out of all reason to expect the law to declare such remoteness in any way objectionable * * * It is in no wise, however, a consequence of this state of things (but something essentially different), to admit of the limitation of remote interests (whether forthwith alienable or otherwise),

in forms which do not spring out of, or take their origin in, the necessary legal relation of one estate which is subsisting, to other interests which are likewise subsisting (although future, because subject and postponed to the former).

§ 301 *e.* “One other observation remains:—The test ordinarily allowed for determining the presence or absence of the danger of perpetuities in respect of future limitations, is not their capacity of being *alienated*, but of being *destroyed*. Extinction and not co-operation is what the law requires to be attainable, in respect of remote future estates, before it acknowledges their remoteness to be harmless. It is to *reverse* the policy of the law, to rely on the vitality, for the purposes of transfer, of a remote expectancy, as a condition which ought to ensure its validity.¹

“If a case be supposed of an estate limited to arise and take effect upon a remote event or contingency, in such a way that it would be uncertain until the actual happening of that event or contingency, whether the gift would ever take effect at all, such a limitation, by our law, would be void, and yet it would fall within the provisions of the new enactment, rendering such possibilities alienable. Now, *not any* executory devise or shifting use, whether limited to a person *in esse* or not, vests any *estate* in the party to whom it is made, before the event on which it depends has taken place. Supposing, therefore, an executory limitation so constructed that it may possibly not take effect until after the limits of perpetuity are passed, it is, *ex necessitate*, a case where the interest under the limitation will remain unvested for

¹ Lewis, Perpetuities, 164; Marsden, Perpetuities, 2, 165; Challis, Real Property, 168–171, 185. *Supra*, § 300 *c.* See Gray, Perpetuities, 2nd Ed., § 268, *et seq.* Mr. Joshua Williams also stated the matter in a form not inconsistent with that of Mr. Lewis. Williams, Real Property, 1st Ed., pp. 317–318.

all that time, and where, consequently, until such time has elapsed there will be no estate in any one by virtue of the limitation; and, as the result of such a condition of the gift, it must upon all principle fail as being a perpetuity. * * *

“The conclusion, then, is, that the circumstance of contingent and executory interests having been rendered alienable at law as well as in equity, does not avail to render valid a contingent or executory limitation which would in other respects be too remote, even though it happen to be limited to a person *in esse* and ascertained, who might forthwith dispose of the interest.”¹

Whatever may be the proper view of the original applicability of the Rule to remainders, it is to be noted that when² subsequently created contingent remainders were exempted in general from their liability, at common law, to be destroyed by the determination of the precedent estate pending the contingency, the statute extended the exemption only to such contingent remainders as comply with the Rule against Perpetuities.³ Our Revision, in dealing with like exemptions, had already required the vesting of remainders by the end of the same period allowed for suspension of alienability.

§ 301 *f*. On the general subject discussed by Mr. Lewis in the remarks quoted in the preceding sections, Mr. Marsden, the author of the later English treatise on the Rule against Perpetuities, says: “It is not a sufficient test of the validity or remoteness of a limitation that, notwithstanding the limitation, the fee simple or the absolute interest in the property which is the subject of limitation can be alienated within the legal period. The books abound with cases in which limitations valid according to this test have been held

¹ Lewis, *Perpetuities*, Supp., 9-20. See II Reeves, *Real Property*, 959.

² By 40 and 41 Vict. c. 33.

³ Challis, *Real Prop.*, 2nd Ed., p. 185.

void for remoteness. * * * Notwithstanding the elementary character of this proposition, it has not always been assented to; and there are *dicta*, and even decisions, contradicting it.”¹

Professor Gray, after mentioning the theory that remainders were never subjected to the Rule against Perpetuities, says: “But it is needless to discuss this theory, the unsoundness of which Mr. Lewis has exposed, for both in England and America contingent remainders have by statute ceased to be destructible. If they were exempt from the Rule against Perpetuities, because they could be destroyed, now that they have become indestructible they must fall within it.”²

§ 301 *g.* The great authority of Challis is often referred to in support of the proposition that the test, under the Rule against Perpetuities, is found not in vesting or destructibility, but in bare alienability. But whatever remarks he may have made elsewhere that might suggest such a thought, he has certainly expressed the contrary view very plainly in Chapter XIV of his work, in the subdivision relating to the Rule,³ as follows: “The Rule against Perpetuities fixes certain limits of time within which every executory limitation not being a limitation subject to an estate tail, must necessarily vest, if it vests at all, on pain of being otherwise void. * * * Much elaborate effort has been expended upon attempts to define a perpetuity, and to found the reason of the Rule now under consideration upon the definition. These labors seem to be superfluous. Without any definition of a perpetuity, the proposition is easily intelligible, that all future interests or claims in, to, or upon any specified property, whether real or personal,

¹ Marsden, Perpetuities, 51.

² Gray, Perpetuities, 2nd Ed., § 286.

³ Real Property, 2nd Ed., pp. 168-171.

which do not arise under, or take effect by virtue of, the rule of the common law, and are not subsequent to an estate tail, must (with a few exceptions requiring specific mention) vest absolutely within certain specified limits of time; and the mischief which would result from the absence of any such restriction, is too obvious to need any proof. * * * Not only must the title become vested in an ascertained class of specified persons within the prescribed period, but the shares in which the different persons are to take the property must also then be ascertained; that is to say, the magnitude of the share to be taken by each member of the class must not depend upon an event which may happen beyond the period allowed by the rule; otherwise the gift will be void for remoteness.”¹

In *Blight v. Hartnoll*, 19 Ch. D. 294, 300,² Fry, J., says: “The Rule against Perpetuities requires, in my view, the ascertainment within the period, not only of the extreme limits of the class of persons who may take, but of the very persons who are to take, and that because the Rule is aimed at the practical object of telling who can deal with the property; and, if you cannot tell who are entitled to the property, but, only who may become entitled to the property, the property is practically tied up.”

The General Statutory Scheme.

§ 302. The notes and drafts of our Revisers show that the various considerations thus later discussed in England were also present to their minds, but it also appears quite clear that they viewed the term “perpetuities” as properly confined, so far as the mere matter of names goes, to the subject of alienability. But the

¹ Also cases cited in Mr. Dale's 12th English edition of *Lewin on Trusts*, (1911), p. 109.

² Quoted by Mr. Marsden, *Perpetuities*, 55.

fact that they looked upon requirements for vesting, as not within the scope of that particular term, does not lead to the conclusion that they considered such requirements non-existent. It was open to them to prefer, as some writers have since preferred, while recognizing their existence, to classify them by themselves. In any event, as evidenced by what they did, they considered them, whether already represented in the then existing law or not, as the proper subject for statutory treatment. What the English courts, whether earlier or later, found it appropriate to do by recognizing a wider scope to the Rule against Perpetuities, the Revisers also found it wise to accomplish by the insertion, in their scheme, of a series of separate provisions, not forming part of what they apparently regarded as a modified Rule against Perpetuities; not dealing directly with mere alienability, which they had already sufficiently provided for; but confined by way of an analogous though distinct requirement, to the subject of postponement of vesting in interest. They did not think that vesting was in itself essential to alienability for they had themselves provided otherwise in what is now § 59 of the Real Property Law. But they recognized, and expressed, the principle that no amount of statutory authorization could render a future estate alienable if there were no one in being to represent it; and this very absence of persons in being, and the inalienability resulting therefrom, could be readily obviated by the simple expedient of insisting upon vesting. For if an estate is to vest, there must be persons in being for it to vest in.

It is to be remembered, too, that they were in the act of proposing radical changes affecting many of the factors that had always been considered in connection with the Rule against Perpetuities, and involving questions of vesting, alienability, destructibility. Reminders were now no longer to be "destructible," and so

that factor was eliminated. Alienability by the end of a term to be provided for, they had determined upon. Their approved authorities showed constant references to vesting, sometimes as a factor of the Rule against Perpetuities, and sometimes apparently as a method by which the Rule operated in fact to obtain alienability.

Under these circumstances, the Revisers were not satisfied to leave the matter to be controlled solely by their sections relating to alienability. And so, perhaps in part with the view that it would furnish a useful adjunct to their sections relating to alienability, in part no doubt to complete in technical detail their general scheme of changes in the real property law, and in part because of the recognized desirability in general of early vesting, they adopted the provisions in question.

Thus in their Notes to Article I, after speaking of the earlier New York statute abolishing entails and effecting the destruction of attempted remainders, they say that ¹ "the object of the legislature was to destroy perpetuities, in other words, to prevent the fee from being rendered inalienable beyond a certain period; and this object is completely attained, if, without defeating the remainder, we confine it to *vest* within the period allowed by law in other cases; * * *." And in discussing their provisions relating to suspension of the power of alienation, they make the unfortunately worded remark that "to prevent a possible difficulty in the minds of those to whom the subject is not familiar, we may also add, that an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred. Where the remainder is vested, as where the lands are given to A for life remainder to B (a person then in being) in fee,

¹ Original not italicized.

there is no suspense of the power of alienation; for the remainderman and the owner of the prior estate, by uniting, may always convey the whole estate. This is the meaning of the rule of law prohibiting perpetuities, and is the effect of the definition in § 14." And in dealing with their section relating to alternative estates,¹ they give as an illustration an estate to A for life, and if he have any issue living at his death, then to such issue in fee; but if he die without such issue, then to B in fee, and add: "Here the remainder to the issue and to B are both contingent, but only one can take effect. It is obvious that these alternative dispositions, however numerous they may be, are free from objection, since as only as one can *vest*, and by *vesting*, defeats all that are subsequent, the estate is not rendered inalienable for a longer period than if a single limitation only had been originally created." Thus they looked to provisions for vesting in due time, as one method of guaranteeing alienability in due time. Whether in addition to various technical reasons incident to the completion of their proposed general scheme, they did in fact contemplate all the further reasons often since enumerated, and already summarized² for requiring the vesting of estates within restricted limits of time, cannot be known, but in any event those reasons exist, and are most weighty, and in themselves fully justify the statutory provisions in question. Having, then, fully provided in their sections relating to suspension of alienability, the materials embodied in Rule I, the Revisers went on to provide, in further sections relating to vesting, the materials embodied in Rule II, and as the two Rules had features, purposes and reasons for their existence, which were common, they gave them both the same statutory term for suspension, or post-

¹ Real Property Law, § 51.

² §§ 20-28; 31-37, 301 c; 313.

ponement, of two lives in being and in certain specified cases relating to real property a further minority.

In a sense, therefore, the two New York rules make up together one Rule against Perpetuities, and in this sense they are frequently treated by the courts; in another sense, one relates to the subject of perpetuities as confined to alienability, and the other, while allied, is distinct, and sometimes treated as not entitled to the same name. This is all a mere matter of names and of no possible practical consequence.¹ As already stated, therefore, and to avoid confusion, the terms perpetuities, and remoteness, are not employed in this volume except in reference to the English laws, and except, also, as they may happen to occur in quotations from the reports. It should also here be noticed that Rule II, now to be considered, affects merely the particular class of estates, or interests, which it refers to as "remainders."² As will be seen from the following sections, the existence under our laws, and the scope, of Rule II, relating to vesting, are established by a group of separate statutory provisions which co-operate to make up the Rule, and which have been interpreted and applied in numerous authoritative decisions. Although the requirement of Rule II applies to all remainders, compliance with it does not of itself necessarily insure their validity. Some remainders are also subject to additional special requirements, which will be mentioned in the appropriate connections. What is here to be considered is the proposition that there is such a principle as that embodied in Rule II, in addition to that embodied in Rule I.

§ 303. "That it is the application of this provision [i. e. Rule I, Alienability] which has most frequently

¹ Matter of Wilcox, 194 N. Y. 288, 299.

² See *infra*, § 304.

come before the courts in the determination of the legality of testamentary dispositions is unquestionable, and this fact has led at times to the assertion that since the enactment of the Revised Statutes there is only one rule [Rule I] against perpetuities in this state.”¹ But such is not the law of New York. “Suspension of the power of alienation is not the only factor in our rule against perpetuities.”² “The provision that the absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than two lives in being at the creation of the estate is by no means the only limitation placed by statute on the power of testators or donors to fetter or tie up estates.”³ Rule II, relating to vesting, also represents the law in this state, and “the revisers did intend, so far as remainders were concerned, in addition to the provision against inalienability, to provide against remoteness of vesting * * *.”⁴ Thus, “A conditional limitation to take effect, if ever, only at the end of a period not measured by two lives in being, is void.”⁵ And “under the statute every future estate⁶ which may not vest within the period of two lives in being at the time of its creation, is void, as is any limitation or condition, by which the absolute ownership of personal property may be suspended beyond the specified period of time.”⁷

¹ Matter of Wilcox, 194 N. Y. 288, 297.

² Matter of Wiley, 188 N. Y. 579.

³ Stoiber v. Stoiber, 40 App. Div. 156, 160.

⁴ Matter of Wilcox, 194 N. Y. 288, 298, where Rules I and II as stated above, §§ 1, 4, are quoted.

⁵ Matter of Wiley, 188 N. Y. 579.

⁶ See *infra*, § 304.

⁷ Henderson v. Henderson, 113 N. Y. 1, 15; Matter of Wilcox, 194 N. Y. 288; Oxley v. Lane, 35 N. Y. 340; Knox v. Jones, 47 N. Y. 389; Robert v. Corning, 89 N. Y. 225; Greenland v. Waddell, 116 N. Y. 234; Matter of Howland, 75 App. Div. 207; Dana v. Murray, 122 N. Y. 604,

The statutory sources of the proposition embodied in Rule II will be traced, and its application illustrated, in later sections. Before doing so, it will be convenient to consider the meaning of certain terms employed in the statement of the Rule, beginning with the term "Remainders."¹

"Remainders."

§ 304. The family of remainders and other future estates, interests and possibilities, has had a varied and troubled career. From the common law remainder with its narrow character strictly defined, we have now evolved a class of future estates, still called remainders, which include, beside those formerly entitled to the name, others which, though then capable of creation, were not designated as remainders, and still others which in earlier times could not have been created at all. To just what point all these changes have brought us at last, on questions of terms and definitions, it is not always possible with certainty to say. Now Rule II, as appears from its own terms, and from some of the statutes hereafter referred to, from which it is derived,

617-18; *Steinway v. Steinway*, 163 N. Y. 183, 195; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108, 114; *Purdy v. Hayt*, 92 N. Y. 446, 451; *Matter of Thomas, Tucker*, 367. The case of *Sawyer v. Cubby*, 146 N. Y. 192, should be referred to as perhaps at variance with these propositions. The decision in *Sanford v. Goodell*, 82 Hun, 369, cannot be sustained on the ground of an undue suspension of the power of alienation, for at any and all times from the death of the testator there were designated persons in being who could, in conjunction, have conveyed an absolute fee in possession; and the result reached by the court can only be supported on the ground that the ultimate vesting of certain remainders might be postponed until the death of three persons in being.

¹ For interesting arguments in favor of the proposition that under the laws of New York there is no such thing as any rule against postponement of vesting, as distinguished from the rule against suspension of alienability, see Professor Canfield's article in *I Columbia Law Review*, 224; Fowler, *Real Property*, 3rd Ed., § 42.

relates only to "remainders," and it thus becomes important to consider the sense in which that term is employed; and certain points which in this connection call for special attention, will here be mentioned.

§ 305. In the first place, according to the present statute, "Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name."¹ This proposition includes, for example, conditional limitations.² Now at common law the feature of being created "at the same time" with the precedent estate was one element of the accepted definition of a remainder.³ This element is not specified in terms in the section quoted above, although the words do appear in the preceding section, in another connection. If the same idea is supposed to be involved in any sense, in the New York statute itself, either in the mere words "precedent estate" or in the mere word "dependent," in any event the intrinsic value of the distinction thus raised has long since disappeared. For where, as is now the case, a remainder cannot be defeated by the owner of the precedent estate, nor by the destruction of the precedent estate in any manner not provided for in the instrument creating it,⁴ nor by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect,⁵ and where the scope of the term "remainder" has been already so far extended as for example to include the limitation of a fee on a fee,⁶ which in one statutory provision is referred to as a "remainder,"⁷ it can no longer

¹ Real Prop. L., § 38.

² Real Prop. L., § 53. See also *id.*, §§ 50-58.

³ 4 Kent Comm. 198.

⁴ Real Prop. L., § 57.

⁵ Real Prop. L., 58.

⁶ Real Prop. L., § 50.

⁷ Real Prop. L., § 42.

be of real importance to maintain a distinction between future estates that are, and those that are not, entitled to the name "remainder."

§ 306. The original Revisers, in their Notes, after referring to estates *in futuro*, as distinguished from remainders, say that "In truth, they are in effect, though not by verbal definition, remainders, commencing in possession on the determination of the *intermediate* estate not granted or devised." They also say, in general, that "The principles by which the Revisers have been governed, in proposing the alterations contained in this chapter, and indeed throughout the Revision, may be very briefly stated. If a rule of law is just and wise in itself, apply it universally, so far as the reasons upon which it is founded extend, and in no instance permit it to be evaded; if it is irrational and fanciful, or the reasons upon which it rested have become obsolete, abolish it at once. * * * Another most important advantage to which we have not yet adverted, will result from reducing all expectant estates substantially to the same class. We shall prevent all future litigation on the purely technical question, to which class or denomination any particular limitation is to be referred."¹ And they also speak, in their notes, of their purpose "to reduce all expectant estates substantially to the same class, and apply to them the same rules whether created by deed or devise." And according to Chancellor Kent,² all expectant estates in the shape of springing as well as other uses, "are in effect become contingent remainders and subject precisely to the same rules." And in these carefully weighed words we probably have the true explanation of what happened in the drafting

¹ Notes of the Original Revisers.

² 4 Comm. 272.

of the Revision. There was apparently an intention, in preparing the definitions, to recognize the continuing existence of a nominal, or verbal, distinction between remainders and other future estates, but to recognize it for purposes of mere convenience of reference only, and to have the same rules apply to all. This seems to be the explanation of the peculiar form of the section relating to remainders.

§ 307. For while “future estates” are defined,¹ by telling just what they are, and reversions are defined,² and vested future estates and contingent future estates are defined,³ yet remainders are not, in that sense, defined at all. All that § 38 does, is to say that the estate there referred to “may be termed” a remainder, and “may be created and transferred” by that name. This is an odd form for a definition, particularly in view of the actual definitions which immediately precede and follow it. But if viewed not as a definition, but as a permission in specified cases, to use a familiar name for certain future estates, the form is natural, and consistent with the remark just quoted from the Revisers’ Notes. And the cases are not free from indications that this view is likely to prevail to a considerable extent, in the interest of that freedom from senseless technical distinctions, of no further practical use, which the Revisers strove to attain. Thus the term “remaindermen” has, as used in another statutory provision, been construed by the Court of Appeals to have been employed by the legislature “in the broad sense of those who might ultimately be entitled to take the estate, whether they were technically remaindermen

¹ Real Prop. L., § 37.

² Id. § 39.

³ Id. § 40.

under the definition of the common law or otherwise.”¹

It may therefore be that Rule II will yet be applied to all future estates, either by way of analogy,² or by reading the statute in the sense just suggested. Indeed it may be that the courts have already gone thus far;³ and there appears in any event to be no doubt that the term “remainder” does at the least, in the present connection, include the case of all such future estates or interests, created at the same time with an intermediate estate, as may yet ripen, even though in derogation of the earlier estate, into an estate in possession.⁴

The mere fact that along with such practical resemblances to remainders, any such given interests may not as yet be entitled to the name of “estate” at all, could not operate to render them free from the rules applicable to remainders, when their very validity thus permitted would result, if they did not, for other reasons, fail altogether, in their becoming, or effectuating, estates at last. So, it has been said, interests in personal property are not strictly or historically entitled to be known as “estates” at all, or any future interests in personal property, as “remainders;” but nevertheless the courts now constantly refer to them as estates,⁵ and as “remainders.”⁶

It is also to be noticed that the statute, in extending generally to estates the capacity of arising in future, even though not “supported” by any “precedent estate,”⁷ says that “*subject to the provisions of this*

¹ Matter of Leask, 197 N. Y. 193, 199-290.

² Cf. § 385.

³ Henderson v. Henderson, 113 N. Y. 1, 15; Fowler v. Ingersoll, 127 N. Y. 472, 477; Matter of Wilcox, 194 N. Y. 288; Hone v. Van Schaick, 7 Pai. 221, 235.

⁴ Lalor, Real Property, 65.

⁵ Steinway v. Steinway, 163 N. Y. 183; Fargo v. Squiers, 154 N. Y. 250, 258; Matter of Ungrich, 48 App. Div. 594, 596, aff'd 166 N. Y. 618.

⁶ § 393, *infra*.

⁷ Real Prop. L., §§ 37, 50, 57, 58.

article, a freehold estate as well as a chattel real may be created to commence at a future day." ¹ Some of the provisions of that article, to which this provision is thus subjected, are those operating to require vesting, as applied to what it terms "remainders," by the end of the statutory period; and this provision is in harmony with the general statutory scheme.

§ 308. But while estates, under the Revised Statutes and Real Property Law, "include every *present right and interest*, either vested or contingent, which may by possibility vest at a future day," they "do not include the mere possibility of a reverter which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of the father who is living." ² Such possibilities of reverter are unobjectionable under Rule II relating to postponement of vesting, because that rule, even if not treated as strictly confined to remainders, is certainly confined to estates and potential estates which are created, and cannot, under any view of our statutes, include possibilities which are not created, but are merely left residing in the grantor, and his heirs, by representation, when he creates a fee on condition subsequent.³ And the same reasoning applies also in reversions. They are usually, but, it has been said, not necessarily, vested; but in any event while "expectant," they are not "future" estates." ⁴ But all future estates

¹ *Id.*, § 50.

² *Nicoll v. N. Y. & Erie R. R. Co.* 12 N. Y. 121, 133; *Upington v. Corrigan*, 151 N. Y. 143; *Fowler v. Coates*, 201 N. Y. 257.

³ *Upington v. Corrigan*, 151 N. Y. 143, and cases cited. Compare *Gray, Perpetuities*, 2nd Ed., § 299.

⁴ *Floyd v. Carow*, 88 N. Y. 560.

and all future interests, at least when so created in connection with the creation of an intermediate estate as to be either actual or potential estates from the beginning, are for the present purpose estates in remainder, and subject to all the rules by which remainders are affected.¹ With this explanation, it is in this inclusive sense that the term "remainder" will be used in the present discussion.

" Within the Statutory Period."

§ 309. One of the several statutory provisions hereafter referred to, which are embodied in Rule II, calls for vesting "within the period" there prescribed; another requires vesting *by the end* of the period; while a third demands that the remainder shall be limited to vest in interest either *during the continuance*, or *on the termination* of the statutory term. All these phrases have, in relation to the subject under discussion, the same meaning, namely, that the requirement is sufficiently satisfied by a limitation under which the remainder must vest, if ever, either during, or at the end of, the appropriate statutory period. This is clearly shown in the illustrative cases cited in the following sections.

" Must Vest." " If Ever."

§ 310. The statutory provisions embodied in Rule II, to the effect that remainders must be so limited as to vest, if ever, within the statutory period, do not mean that only such as are *certain* to vest within the period will be allowed to stand. No contingent remainder is certain to vest. What the statutes mean is that the remainder must be so limited that by the terms of its

¹ See *Matter of Wilcox*, 194 N. Y. 288.

creation it must either vest within the statutory period, or else by the end of that time cease to be a possibility.¹ Where there is a vested remainder in fee, the remainderman himself may die before the termination of the precedent estate. But in that case his heirs take through him. The existence of this possibility does not interfere with the vested nature of the remainder.² The ultimate remainderman need not necessarily be in being at the creation of the estate. There is no prohibition against the limitation of such estates to persons not then in being,³ except in special cases such as those relating to successive life estates,⁴ and an estate for life limited on a term of years.⁵

And Mr. Lewis⁶ thus states the similar principle applicable under the English Rule against Perpetuities: "It is not sufficient, in order to test the validity of a limitation, to inquire whether it be *capable* of taking effect within the period prescribed by the Rule; it must be so framed as, *ex necessitate*, to take effect, if at all, within that period." "A limitation which will not necessarily take effect, if at all, within the period prescribed by the Rule against Perpetuities, and which is, therefore, according to the rule just mentioned, bad in its inception, will not be substantiated or made valid by any events happening subsequently to the time of the creation of the limitation." "The time from which the period fixed by the Rule against Perpetuities is to be computed, being the *creation* of the limitations requiring its application, that computation must be

¹ See *Hawley v. James*, 5 Pa. 317, 463-4, 466; *Manice v. Manice*, 43 N. Y. 303, 374; *Brown v. Evans*, 34 Barb. 594, 605; *Butler v. Butler*, 3 Barb. Ch. 304, 311.

² *Van Axtel v. Fisher*, 117 N. Y. 401.

³ *Manice v. Manice*, 43 N. Y. 303, 374, 376.

⁴ Real Prop. L., § 43.

⁵ *Id.*, § 47.

⁶ Perpetuities, 170-173.

made at the date of the deed, when the limitations are created by an instrument *inter vivos*, and at the *death of the testator*, when they are created by will." "The remoteness against which the Rule for prevention of Perpetuities is directed, is remoteness in the commencement, or first taking effect of limitations, and not in the cesser or determination of them." So Rule II, under the laws of New York, requires that a remainder must be so limited as to vest, if ever, during, or by the end of the period prescribed by statute; and when a remainder is so limited, all that the statute calls for has been complied with, and the time and the means for possible violation of the Rule, in respect to that particular limitation, are then gone forever. The Rule requires certain characteristics in the limitation of a remainder, in order that it may be a valid remainder; and the question of whether it has those characteristics or not, depends on what it is in its first appearance as a limitation. If it does not comply then, it never can comply later; and if it does comply then, nothing that can happen can ever make it obnoxious to the Rule.

The Rule relates to the time of its birth as an existing limitation and to the question of whether, viewed as from that time, it must, on the one hand, or on the other hand may not, vest, if ever, within the period allowed. This being the principle, the fact that the instrument also provides, in the case of an estate limited to vest in interest within the period, that it shall end at a time which may, or even which must, occur after the expiration of that period, cannot affect the validity of the estate limited. The Rule (as distinguished from certain aspects of Rule I relating to alienability) says nothing about the necessity of ending an estate within the statutory period. In fact there is no occasion for providing for any ending whatever. The due limitation of a vested remainder in fee simple absolute, illustrates

the case of an estate which, so far as the instrument creating it is concerned, may continue for ever. It is vested, and thus satisfies Rule II, and is alienable, and satisfies Rule I. If it is unobjectionable to have it run indefinitely, there can be no objection to a due form of limitation to expire at any time, or be cut short by any event; the Rules have no concern to lengthen out given estates. But if the vested, alienable, valid estate may validly expire beyond the term of the statutory period, a contingent remainder which is to succeed it is not thereby validated. To be valid, *it* must vest in interest if ever, by the end of the statutory period.

Must Vest "in Interest."

§ 311. The term "vested in interest," is defined in § 144. A remainder vested in interest, represents a present fixed right of future enjoyment. It is thus distinguished, on the one hand, from contingent remainders, which do not represent a present fixed right, and on the other hand from estates vested in possession and accordingly representing a right which though fixed, relates not to future, but to present enjoyment. Rule II requires that remainders shall be so limited that by the end of the statutory period, if ever, they must vest in interest,—that is, cease to be contingent remainders. If a remainder must thus vest in interest, Rule II is thereby satisfied, even though the vesting in possession may be further postponed.¹

§ 312. In the cases under Rule II, there is no restriction on the number of contingencies which must happen before the remainder vests, if only they are such that it must vest, if ever, by the end of the statutory period.²

¹ *Murphy v. Whitney*, 140 N. Y. 541; *Matter of Murphy*, 144 N. Y. 557; *Matter of Gardner*, 140 N. Y. 122, 129; *Matter of Wilcox*, 194 N. Y. 288.

² See the possibilities discussed in *Kenyon v. See*, 94 N. Y. 563, and in *Genet v. Hunt*, 113 N. Y. 158. There are, however, some statutory pro-

And it is here, further, to be noticed that although contingent future estates may be divided into various groups and sub-groups, mentioned in Chapter III, which are of importance in their relation to suspension of the power of alienation, yet in respect to postponement of vesting these classifications are of no consequence; the only point there of interest being the bare distinction between remainders that are vested, and those that are contingent. This distinction is, within the appropriate scope of the present volume, discussed in Chapter XI.

The only point here calling for special mention is, that the compliance of a given remainder with the requirements of Rule II, does not necessarily establish the validity of the whole scheme of disposition of which the remainder forms a part. That remainder, by such compliance, is, when viewed merely by itself, rendered valid, but other remainders may nevertheless be void, and their invalidity may carry down with them the one which was duly vested. Or the vested remainder, though vested, and so valid, may be vested subject to possible defeat by some contingent remainder, which latter, to be valid, must also comply with Rule II.

Sources of Rule II.

§ 313. As already pointed out in Chapter I, the reasons by which the existence of Rule II is justified, are found in considerations of public policy. The statutes which it embodies, and which are examined in detail in later sections, co-operate, by requiring the early and absolute vesting of title, to render properties of greater value, not only to their owners but to the public at large, and in making the ownership certain,

visions which involve, in certain cases, a further necessity of vesting in possession. On the other hand, the improbability of a contingency is immaterial, if it is not too remote. Real Prop. L., § 52.

to avoid serious dangers to the public as well as to many who are entitled to look to the state for special protection. These ends the statutes attain, like those also which are embodied in Rule I in relation to alienability, by imposing certain restrictions. But it is to be noticed that the Rules are aimed not at restriction as an end, but at freedom. What is desired, is the continued free right to sell and exchange, to spend as the owner pleases, to devise or bequeath as he wishes; the continued incentive to utilize properties to good advantage, and to improve them in the interest of the common welfare; and to obliterate objectionable conditions which both inalienability, and the existence of uncertainties and contingencies, interpose to create.

But if there were no legal restrictions, this desired freedom would soon disappear. Absolute freedom to the present owner would too often be used by him to deprive future owners either of all freedom, or of any common convenience and facility in the exercise of it, and thus if the law, in an effort to secure freedom to deal with property, should omit statutory restrictions such as are contained in Rule II, as well as in Rule I, other restrictions or obstructions continuing far into the future, would be imposed by individuals. This result the statutes in question, and other principles in similar fields, obviate by taking the matter into the hands of the law, and vesting in absolute owners the free right to dispose of property, or of the successive estates which may exist in it, *excepting only* (so far as concerns our present discussion) the right to deprive their successors in beneficial interest of the same freedom and facility. And as to do this without leeway for special cases would introduce unnecessary hardship, and itself constitute a danger to the general as well as to private interests, it is further made possible not only to suspend the power to alienate, but, as a separate matter,

to postpone the absolute vesting of remainders for a period, defined by statute, and arrived at by a consideration of the reasonable needs of the owners of property, and their ordinary and reasonable opportunities for planning wisely for the future.¹

Rule II, then, which deals with the vesting of remainders is derived not from one statutory provision covering all cases, but from several statutory provisions which, among them, cover all cases, and prescribe, or involve, in each particular case, the particular statutory period to which it is subject. These provisions, except in respect to certain variations relating to the maximum authorized term, apply also to personal property. We will first examine those relating to remainders limited on a fee.

Remainder on a Fee.

§ 314. Such remainders are dealt with in two statutory provisions. (1) "Subject to the provisions of this article, * * * a fee or other less estate may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article."² (2) " * * * a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age."³

§ 315. The first of these two provisions thus covers

¹ Lewis, *Perpetuities*, pp. 1-6. Chapter I *supra*, §§ 20-28; 31-37; 301 *c.*

² Real Prop. L., § 50. *Purdy v. Hayt*, 92 N. Y. 446, 456; *Mott v. Ackerman*, 92 N. Y. 539, 549; *Matter of Wilcox*, 194 N. Y. 288, 297-8, 299

³ Real Prop. L., § 42.

ALL cases of contingent estates limited on a fee, whether they are themselves estates in fee or not, and permits their valid creation if so limited that they must vest, if ever, by the end of the appropriate "statutory period." The second statutory provision authorizes a contingent fee limited on a defeasible fee,¹ but instead of being a general provision like the first one, it treats only of a particular case and consists in a permission, in that case, to extend still further than would otherwise be permissible, the time allowed for vesting. It is confined to the case where the preceding fee is itself a *remainder*, limited as there prescribed. Now a remainder in fee is not itself required to become vested until the end of the two lives. It may be limited to vest by the end of one life, or by the end of two lives. In the latter case it would consume the whole of the period ordinarily allowed for the postponement of vesting as well as for suspension of the absolute power of alienation, and apart from special authority no further contingent remainder could be left still outstanding. It is just this special authority that the provision above quoted is intended to give. It applies to all cases of a remainder in fee, defeasible during minority, and it says, in effect, that a further and contingent remainder in fee may be limited to vest in case of the determination of the prior remainder in fee during the minority of its owner.²

§ 316. In *Matter of Wilcox*,³ testator left one third of his residuary personal estate in trust for the life of his daughter Frances, and at her decease, in trust during the respective minorities of such children as she

¹ Radley v. Kuhn, 97 N. Y. 26, 35.

² Radley v. Kuhn, 97 N. Y. 26, 35. See also the statutory provision relating to remainders on what would formerly have been estates in fee tail, and their vesting in possession. Real Prop. L., § 32.

³ 194 N. Y. 288.

might leave surviving; and at their majorities absolutely to those children; and in case Frances left no children surviving who should attain the age of 21 years, then absolutely to a daughter and son of testator.

The provisions for trusts for the minorities of the children were held void because the children might be persons not in being at testator's death.¹ Frances died leaving no issue surviving. If there had been such issue, they would, at the death of Frances, have been entitled to the principal of the fund, subject only to the contingent limitation over to testator's son and other daughter. This gift over was only to take effect in case Frances left no issue who should attain the age of twenty-one years. It was not also provided that it should take effect in case Frances left no issue at all.² Hence it was held that the question of its validity could not be allowed to turn on the actual fact that she left no issue, but depended on whether it would have been a valid contingent legacy if Frances had left issue.

Now although the legacy over, as given, was contingent, yet it was so solely on account of the uncertainty of the predicated event. For as, at the death of Frances, if she left issue, all the persons in whom, or in some of whom, the legacy could finally vest absolutely, would be ascertained persons in being, their interests would be at all times alienable, and the only contingency there was anywhere consisted in the uncertainty as to which of them would ultimately take. In other words the sole ground for attacking the validity of the ultimate disposition to testator's daughter and son was, that while entirely alienable, it could not become vested at all, unless all such children as Frances might leave, should die under majority. And on this express ground the remainder over was held void, as

¹ Id., p. 293.

² See Chapter X.

“a remainder in fee limited upon a remainder in fee upon a contingency which might not happen within the period of two lives in being.”¹

§ 317. In *Oxley v. Lane*,² there are two instances of postponed vesting. For first, there was a legacy of \$1,250. to each of two minors, the principal to be paid to them at the end of 25 years, and if either should earlier die without issue, its share was to go to the survivor. This gift over was sustained on the ground that “this contingent qualification will necessarily cease with one life, so that the absolute ownership is not thereby suspended for an unlawful period.” These legacies could have been transferred at any time by due action on behalf of both infants, but it was not on this ground, but on the ground that the mere contingency as to which would take must terminate by the end of one life in being, that the provision was sustained. In the second place, in respect to various dispositions of real and personal property, there was, in the eighth clause of the will, a provision that if any of the designated devisees or legatees should die without issue before the end of a term of twenty-five years, his share should go equally to the others. In one of the shares, there was a possibility that this contingency might outlast three lives in being, and it was held void, although after two lives had ended it could not have been inalienable, because all who could possibly take it were living. As to each of the other shares, the court preferred the view that the contingency could not extend beyond two lives, but recognizing the possibility of a construction that a sub-share, once devolved, might still be subject

¹ *Matter of Wilcox*, 194 N. Y. 288, 299. Also *Tayloe v. Gould*, 10 Barb. 388. See *Thompson v. Thompson*, 28 Barb. 432; *Brown v. Evans*, 34 Barb. 594; *Booth v. Baptist Church*, 126 N. Y. 215, 240.

² 35 N. Y. 340, 345. See *Matter of Wilcox*, 194 N. Y. 288, 300.

again and again to subsequent devolution to survivors, it held that in that event the later limitations over would be void. But they could not be so on the ground of undue inalienability. The persons who could ever acquire rights, as purchasers, by successive devolutions, were all in being. The actual situation was that limitations over, which were wholly unobjectionable except for bare postponement of absolute vesting, were held void.¹

§ 318. We will now take up the statutory provisions which restrict the permissible period for postponement of the vesting of remainders limited on an estate for a life.

Remainder on an Estate for Life.

§ 319. Such remainders are dealt with in four statutory provisions:

§ 320. (1) "Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and on the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created."²

¹ Also *Hatfield v. Sneden*, 54 N. Y. 280, 284.

In *Griffin v. Shepard*, 124 N. Y. 70, the remainder over in case the first taker in fee should not leave a child who should reach majority, was treated as a valid future estate. The practical result reached would have been the same if it had been treated as void. But its validity was no doubt predicated on the construction that the contingency related to the state of facts as they might exist at the death of the first taker and not at any later period, and such is the statement of the court below, 40 Hun, 355, 358.

² Real Prop. L., § 43; *Matter of Ryder*, 41 App. Div. 247; *Matter of Conger*, 81 App. Div. 493, 502; see *Woodruff v. Cook*, 61 N. Y. 638; *Thieler v. Rayner*, 115 App. Div. 626, *aff'd* 190 N. Y. 546. This statute refers to successive legal, not equitable, estates. As to trust estates, see § 342.

§ 321. (2) "A remainder shall not be created on an estate for the life of any other person than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created on such an estate in a term of years, unless it be for the whole residue of such term." ¹

§ 322. (3) "When a remainder is created on any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder shall take effect on the death of the two persons first named, as if no other lives had been introduced." ²

§ 323. (4) "Subject to the provisions of this article, * * * an estate for life may be created in a term of years, and a remainder limited thereon; * * *." ³

§ 324. In *Purdy v. Hayt*,⁴ there were three successive estates for life, followed by a remainder in fee which was still contingent when the second life estate ceased, and it was held that though the third life estate must be cut out, the ultimate remainder in fee, being contingent, could not be accelerated, under Real Property Law, § 43, and was void. It is true that there were two reasons for the invalidity of the ultimate remainder: for first, it was contingent, and secondly, the contingency was of such a nature as to occasion suspension of the power of alienation. But this latter reason was not essential to the finding of invalidity. If, at the end of the second life, it had been contingent and yet alienable, it would have been equally impossible to

¹ Real Prop. L., § 44.

² Real Prop. L., § 45.

³ Real Prop. L., § 50.

⁴ 92 N. Y. 446. See *Matter of Wilcox*, 194 N. Y. 288, 298.

accelerate it, and it would still have been void, for it is only vested remainders which may be thus accelerated.¹

§ 325. So *Matter of Conger*,² holds that an ultimate remainder in personal property, after three successive life estates, would be void, except as saved by the statutory provision³ for cutting out the third life estate and accelerating the remainder.⁴ If it had been contingent beyond two lives it could not thus have been saved.⁵

§ 326. Thus the foregoing statutes, in addition to other results effected by them, operate as a matter of fact to establish, as applied to remainders limited on an estate or estates for a life or lives, the proposition embodied in Rule II, that no remainder is valid unless so limited that it must vest, if ever, by the end of the statutory period.

§ 327. If life estates are given to tenants in common simply and without cross-remainders, no new difficulty is presented, for each undivided share is judged solely on its own merits, and the validity of the respective remainders is determined according to principles already discussed. But where the precedent estate for life is given to tenants in common with cross-remainders some special features are presented. So far as Rule I goes, any number of successive life estates, either directly, or by way of cross-remainders, to persons in being, and applying not only to the original shares but also to the accrued sub-shares and affecting all the property as long as any designated persons, living at

¹ *Dana v. Murray*, 122 N. Y. 604, 618; *Purdy v. Hayt*, 92 N. Y. 446, 451; *Graham v. Graham*, 49 Misc. 4.

² 81 App. Div. 493.

³ Real Prop. L., § 43, applied to personalty by Pers. Prop. L., § 11.

⁴ *Orphan Asylum v. White*, 6 Dem. 201.

⁵ Cases last cited.

the creation of the estate, survived, would not effect a suspension of the power of alienation.¹ But in respect to postponement of vesting, under Rule II, the statutory provisions respecting successive life estates come into play. For these cross-remainders constitute successive estates for life, and consequently there can be under the statute but two life estates in all as to each parcel or share, and the ultimate remainder, in order to be valid under the statute, must be vested at the end of the two lives. The remainders in the respective shares may be so limited as to be void as to one or more of the shares and good as to the rest. The limitation may be of such a character that it must remain uncertain, until one or more of the tenants have died, which remainders could vest in due time, and in such a case the continuance of this uncertainty as to a given remainder, if sure to be terminated within the statutory period, does not affect its validity. But where such uncertainty as to which share is to be affected, and which remainder void, will by the terms of the limitation outlast the statutory period, so that at the end of that period it will still be impossible to ascertain finally which was the valid and which the invalid remainder, here the entire ultimate remainder for all the shares is void *ab initio* under the statute.²

¹ Purdy v. Hayt, 92 N. Y. 446, 451; Beardsley v. Hotchkiss, 96 N. Y. 201, 214; Mott v. Ackerman, 92 N. Y. 539, 550; Woodruff v. Cook, 47 Barb. 304; Woodruff v. Cook, 61 N. Y. 638.

² Cf. Dana v. Murray, 122 N. Y. 604; Purdy v. Hayt, 92 N. Y. 446; Mott v. Ackerman, 92 N. Y. 539, 550; Matter of Perry, 48 Misc. 285. See also the cases relating to gifts to "classes." § 366

"Having restricted to two the lives in being during which the absolute power of alienation may be suspended, the object of the revisers by these further statutes was, by an accompanying but distinct rule, to prevent estates of any kind from being projected into the future farther than the period of two successive lives of persons in being when the estates are created." 2 Reeves, Real Property, 1271, note (a).

And as Mr. Fowler points out,¹ though cross-remainders usually follow particular estates limited to tenants in common, "a limitation may be of one lot to A and another to B, and if either die without issue the survivor to take. Here A and B are not tenants in common, but have cross-remainders."²

§ 328. Where the life estate upon which a remainder is limited, is one granted or devised to several persons to be held by them as joint tenants, a curious question concerning the bearing of Rule II may be presented. For a life estate, as well as a term of years, or an estate in fee, may be created in such a manner as to be held by the tenants in joint tenancy,³ so that "the entire tenancy upon the decease of any of them, remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance, or a common freehold only, or even a less estate."⁴ The right of survivorship applies only to the estate so held, and not to anything further. After an estate thus granted for life to hold in joint tenancy, there might also be a remainder limited to

¹ Real Prop. L. § 38.

² In *Bowers v. Beekman*, 16 Hun, 268, there was a devise to four persons "for and during the life of the longest lives of them," with no ultimate remainder over. The devise was held void on the ground that it suspended the power of alienation for more than two lives. But there was nothing to prevent the four persons from conveying the estate devised, and in conjunction with all the heirs, in whom the reversion vested, an absolute fee in possession could have been conveyed at any time. But the decision might be supported on the theory that the four devisees took under a tenancy in common with cross remainders, from which it would follow that some of these remainders (their identity remaining in the meantime uncertain) would not vest until after the expiration of two prior life estates, and were void for undue postponement of vesting; and that accordingly the entire scheme was void.

³ Co. Litt. Lib. 3, c. 3; Challis, Real Prop., 333; Digby, Law of Real Prop., 276; Flintoff, *Introduct. to Conveyancing*, 330; Real Prop. L., § 65.

⁴ Flintoff, 330.

others.¹ The nature of a joint tenancy was, and is, such that each owner's interest and title range over the whole estate, so that (except in certain respects not here of moment) each is deemed to own all, and therefore, as the tenants die, the survivors secure nothing additional by way of any remainder on the shares of the decedents, but merely continue, as before, to own all, until at last the final survivor has title to all, as in this sense he has had from the beginning, and may hold it until the estate granted ends.² The right exists, during the tenancy, to effectuate a change to a tenancy in severalty, but this is not here in point.

§ 329. Thus if an estate is granted or devised to several, to be held by them in joint tenancy, so framed as to be an estate for life to last, by way of survivorship, while any of the tenants live, it is evident that the estate is one for the life of that one who shall live the longest.

§ 330. Now the necessity, under Rule II, for the vesting, by the end of the "statutory period," of remainders limited on estates for life, has in previous sections been based upon two statutory provisions. One of these applies to the case of a remainder limited on a succession of life estates more than two. That provision cannot apply to the case now under discussion, where the joint tenancy presents an instance not of successive life estates, but of one life estate in which each is interested as long as he lives, but which, as an estate, runs through the one life of the tenant who shall live the longest. The other statutory provision already referred to, applies to the case of an estate "for the life of any other person than the grantee or devisee of such estate," and requires the elimination of all the lives in

¹ Co. Litt. *supra*; Challis, 334; Flintoff, 322, 325, 330, 331, 334.

² Id.

excess of the two first named, and the vesting in possession, at their expiration, of the ultimate remainder, if then already vested in interest. That statute would apply to an ordinary life estate held in joint tenancy, where the lives by which the term is measured are those of persons others than the life tenants. The question here is, whether it also applies where, in such a case, it is the lives of the tenants themselves, or rather the life of that one of them who shall live the longest, by which the term is measured. In the first edition of this book, the opinion was expressed that that statute does not apply. Further study has suggested the possibility of a different view, which will now be offered merely as a suggestion.

§ 331. In a certain sense, then, an estate in joint tenancy, framed to run through the life of that one of the several tenants who shall live the longest, is undoubtedly an estate for the life of another. At the origin of the estate, and perhaps until near its close, no one can tell whose life it is that is to measure its continuance. Each tenant participates in an estate for life in the entire property, but it cannot be said to be measured by his own life. His interest in the estate will end with his life, but the estate itself, if allowed to run through its term as such, will only end with the life of the final survivor. But the question is whether, in the sense of the statute, it is an estate for the life of a person other than the grantee.

§ 332. Challis seems to imply that it is a life estate *pur autre vie* at common law. For he says: "Littleton's definition of joint tenancy is founded upon the mode in which an estate is limited to joint tenants. If lands are limited to several persons by name, *habendum* to them for life, or lives, those persons are joint tenants during that life or those lives. (Litt. sect. 277.) They

have an estate *pur autre vie* in joint tenancy. Similarly, if lands are limited to several persons by name, *habendum* to them and their heirs, those persons are joint tenants in fee simple.”¹ This statement, however, is not free from ambiguity. But on turning to the same writer’s complete classification of estates,² we find substantial support for the view that he regards every estate for life in joint tenancy as an estate *pur autre vie*. For after stating that every estate for life must be either 1. An estate for the life of the tenant himself, or 2. An estate *pur autre vie*, he subdivides this latter group as follows:

- (a) An estate for the life of one other person;
- (b) An estate for the joint lives of several persons, and
- (c) An estate for the life of the longest liver of several persons.

This classification is open, however, to the meaning, that an estate for life measured by the longest life of the grantees themselves, and held in joint tenancy, is in a legal sense an estate measured by the life of each, because it may last through the life of any one, (a fact which in itself would, if a given estate did not belong under any other head, be enough to render it an estate for life),³ and thus should be called an estate for the life of the tenant himself, and not an estate *pur autre vie*.

§ 333. One proposition is plain. The estate under consideration is a recognized form of estate for life, and accordingly must belong under one or the other of the only two classes of life estates. It does not seem to fit in, without difficulty, into either class, but it is appar-

¹ Challis, Real Prop., 333.

² Id., 311 and 325.

³ Williams, Real Property, Chapter IV.

ently at least as feasible to classify it as a life estate *pur autre vie*, as to make it a life estate for the life of the grantee himself. But however this may be, the real question is whether the Revisers and the Legislature may be deemed, as applied to the point under discussion, to have placed the estate in question among estates for the life of a person other than the grantee or devisee. In considering this, it would appear highly improbable that there was any intention to favor, by exclusion from the application of the statutes requiring the vesting of remainders, the one particular form of tenancy against the very existence of which the statutes raise a presumption,¹ and against which equity had long showed a leaning in favor of tenancy in common.² It would appear, on the contrary, from the statutes referred to,³ that the intent was to cover all cases of life estates granted or devised to continue, in whatever form, during the lives of more than two persons, and the language of §§ 44-45 seems to be broad enough (whatever the proper place in the common law classification) to warrant the inclusion of all life estates held in joint tenancy, even though the estate is to be measured by the life of the last surviving tenant. If that view is correct, there would be not even one exception to the application of Rule II to all remainders whatever.⁴

§ 334. We will now examine the statutes relating to remainders limited on a term of years.

¹ Real Prop L., 66.

² Foster, Joint Ownership, 27.

³ Real Prop. L., § 43-5.

⁴ On the general subject of remainders limited on estates held in joint tenancy, compare *Sanford v. Goodell*, 82 Hun, 369; *Murphy v. Whitney*, 140 N. Y. 541; *Thieler v. Rayner*, 115 App. Div. 626, *aff'd* 190 N. Y. 546; *Matter of Eldridge*, 29 Misc. 734, 62 N. Y. Supp. 1026.

Remainder on Term of Years.

§ 335. This subject is dealt with in the following statutory provisions:

§ 336. "A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof." ¹

§ 337. (2) "No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate." ²

§ 338. (3) "All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership [involving both alienability and vesting, see Chapter VII,] of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee." ³

§ 339. (4) "Subject to the provisions of this article, * * * a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; * * *." ⁴

§ 340. Thus the foregoing statutes establish the correctness, as applied to remainders limited on an

¹ Real Prop. L., § 46. *Stoiber v. Stoiber*, 40 App. Div. 156, 160; *Hone v. Van Schaick*, 7 Pai. 221, 235; *aff'd* 20 Wend. 564; *Hawley v. James*, 5 Pai. 318, 463-4; *Butler v. Butler*, 3 Barb. Ch. 364, 311.

² Prop. L., § 47.

³ Real Prop. L., § 49. See also *id.* § 60, as to "disposition of rents and profits"; §§ 131, 144, and 179 as to Powers, and Pers. Prop. L., § 11.

⁴ Real Prop. L., § 50. *Wilber v. Wilber*, 165 N. Y. 451.

estate for years, of the proposition embodied in Rule II, that a remainder, to be valid, must be so limited that by the end of the statutory period, if ever, it must vest in interest.¹

§ 341. And in *Rose v. Rose*,² (in respect not to the primary bequest to a corporation not yet formed, but to the alternative bequest to the Colonization Society), the bequest was given to an existing corporation subject to the condition precedent that within five years a certain other proposed corporation should *not* be formed and raise a fund of \$300,000. The decision that the bequest was invalid was placed on the ground of postponement of vesting for a term not duly measured by lives. There was no express trust; the corporation was in existence, and specifically designated; it was certain to take, under the terms of the instrument, if specified events did not occur; and therefore the gift, while contingent, was contingent solely upon the non-happening of a named event. The only feature which could be suggested as operating to suspend the power of alienation, arises from the nature of the legatee as a charitable corporation, a point not mentioned by the court. But any inability, if any, which arises merely from that cause, exists just as much after vesting in possession as before, and is not the kind of inability which occasions suspension of the power of alienation.³ And in *Thieler v. Rayner*,⁴ it is expressly held that if a remainder is vested in interest in a charitable corporation, the fact that it may not vest in possession during the "statutory period" does not occasion any suspension

¹ *Henderson v. Henderson*, 46 Hun, 509, 513 and 113 N. Y. 1; *Matter of Bray*, 118 App. Div. 533.

² 4 Abb. Ct. App. Dec. 108, 114.

³ Chapter VIII. See *Matter of Wilcox*, 194 N. Y. 288, bottom of p. 301.

⁴ 115 App. Div. 626, *aff'd* 190 N. Y. 546.

of the power of alienation.¹ The same principle applies to a remainder which, though contingent, is contingent solely on account of the uncertainty of the event, and if it is still invalid, as in *Rose v. Rose*,² it must be on account of the undue postponement of vesting. If duly vested, it would be valid.³ The cases which have cited *Rose v. Rose*, have done so on questions analogous to that in the primary bequest there in issue, to a corporation not yet in existence.

Remainder on Estate in Trust.

§ 342. If the precedent estate is held by the trustee of a valid express trust, he must necessarily have the legal title,⁴ and his estate must be one of those enumerated in the list of possible estates, in the Real Property Law, § 30, and thus to all practical intents must, while the trust term endures, and subject to termination when that term ends, be regarded either as an estate in fee,⁵ or an estate for life,⁶ or an estate for years.⁷

¹ *Matter of Conger*, 81 App. Div. 493.

² *Supra*.

³ *Orphan Asylum v. White*, 6 Dem. 201.

⁴ *Kernochan v. Marshall*, 165 N. Y. 472, 479.

⁵ *Knox v. Metropolitan El. Ry. Co.*, 58 Hun, 517, 520, *aff'd* 128 N. Y. 625; *Leggett v. Perkins*, 2 N. Y. 297, 305; *Leggett v. Hunter*, 19 N. Y. 445, 454; *Briggs v. Davis*, 21 N. Y. 574; *Lahey v. Kortright*, 132 N. Y. 450, 455; *Brewster v. Striker*, 2 N. Y. 19, 31 (see *Morse v. Morse*, 85 N. Y. 53, 60); *Salisbury v. Slade*, 160 N. Y. 278, 290; *Bennett v. Garlock*, 79 N. Y. 302, 317; *Genet v. Hunt*, 113 N. Y. 150, 169; *Duvall v. English E. L. Church*, 53 N. Y. 500, 503; *People ex rel. Short v. Bacon*, 99 N. Y. 275, 319; *Delafield v. Shipman*, 103 N. Y. 463, 467-8.

⁶ *Locke v. F. L. & T. Co.*, 140 N. Y. 135, 146; *Matter of Brown*, 154 N. Y. 313; *Matter of Tompkins*, 154 N. Y. 634, 644.

⁷ *Montignani v. Blade*, 145 N. Y. 111; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Keenan v. Keenan*, 122 App. Div. 435; *Franklin v. Minertzhagen*, 39 App. Div. 555.

§ 343. If in any given case the estate of the trustee is to be thus regarded as in fee, or for years, the necessity that a remainder thereon, to be valid, must be so limited that it must, if ever, vest in interest by the end of the "statutory period," is as clearly imposed by the statutes on that subject, already considered, as if the precedent estate were absolute, and not in trust. But if the estate of the trustee of a given indivisible trust is to be regarded as an estate for life, because measured by the lives of designated individuals, the statutes above referred to, in relation to successive life estates, or a life estate measured by lives of third parties, would not, by their own force alone, operate to impose the necessity of vesting by the end of the "statutory period." For they refer to legal, not equitable estates, and do not apply where the lives in question are employed only as a measure of the continuance of a single trust term, or where they are merely the lives of beneficiaries during a trust term.¹ They do not apply to the case of a single trust created to continue generally throughout the continuance of each and all of several designated lives, and the court cannot in such cases, by dropping out a life or lives in excess of two, sustain a portion of a scheme intended by its creator to constitute a single entity.² It does not appear, however, whether the cases cited proceed on the theory that the estate of the trustee was an estate for life *and yet* those statutes did not apply, because not so intended; or on the theory, which would seem, as applied to most instances, to have the better support, that even in such cases the legal

¹ Gilman v. Reddington, 24 N. Y. 9, 15.

² LaFarge v. Brown, 31 App. Div. 542, 545; Knox v. Jones, 47 N. Y. 389, 398; Matter of Conger, 81 App. Div. 493, 502; Amory v. Lord, 9 N. Y. 403, 419; Shipman v. Rollins, 98 N. Y. 311, 314, 330; Woodruff v. Cook, 61 N. Y. 638, 641; Matter of Wilcox, 194 N. Y. 288, 306. But the statutes might find an application in the case of successive disconnected estates, each in trust for a life.

estate of the trustee of a trust of the third class, to receive and apply rents and profits, is, while it continues, in such sense a qualified fee as for that reason to render the statutes inapplicable.¹ As the law stands, therefore, it cannot be confidently asserted that any of the various statutes already considered in this chapter always operate, in all cases, and by their own force alone, to support the invariable applicability of the principle of vesting set forth in Rule II, for it may be that none of them covers all cases of remainders on express trusts such as must, to be valid, be measured by lives.

§ 344. But however this may be, there is a group of statutes which here come into play and which do substantiate the invariable applicability of Rule II to all cases of remainders limited upon an estate in the trustees of such express trusts. The statutes which have that effect are those which, together, impose upon all trusts which operate to effect a suspension of the power of alienation, a maximum "statutory period" within which they must be restricted by the terms of their creation. One invariable and practical, even if only indirect, result of these statutes is, that if a trust estate is thus duly restricted, a remainder limited to take effect upon the termination thereof will necessarily vest not only in interest, but in possession, by the end of the statutory period; while if the trust is not thus duly restricted, such a remainder can never vest at all, for the precedent trust being void, the occasion when the remainder was to vest in possession can never come into existence, and thus the remainder will be void also.²

¹ *Knox v. Metropolitan El. Ry. Co.*, 58 Hun, 517, 520, aff'd 128 N. Y. 625. See also *Matter of Hurlbut*, 51 Misc. 263; and the discussion of the estate of the trustee, and citation of authorities, in *Fowler's Real Property Law*, 3rd Ed. pp. 324, 488, 492.

² *Schettler v. Smith*, 41 N. Y. 328, 347; *Knox v. Jones*, 47 N. Y. 389; *Ward v. Ward*, 105 N. Y. 68, 75.

“To render future estates valid they must be so limited that the prior estate will absolutely terminate within the period prescribed by the statute, otherwise they are void.”¹ Another way of stating the proposition, from the point of view not of the validity of the trust estate, but of the validity of the remainder, is that a remainder, after such an estate in trust as must be measured by lives, must itself, to be valid, be so limited that by the end of the statutory period, if ever, it will vest in possession. If so limited it will, so far as postponement of vesting goes, be valid, and if not so limited it will be void.

§ 345. This proposition, in its requirement of vesting in possession, is broader than that embodied in Rule II, which only demands vesting in interest, but it includes all that is required by Rule II and thus fully supports it as to all remainders limited on such trusts as must, to be valid, be restricted to the “statutory period.” The term “vested in possession,” as employed in this present connection, merely refers to absolute vesting of a present, as distinguished from a future, estate, and does not necessarily imply the absence of bare postponement of the right in the vested owner to actual occupancy.

§ 346. It might be said, that the statutes thus relied on, restricting the term of certain express trusts, are not sound authorities in support of the proposition embodied in Rule II as to the vesting of remainders, because it was not for the purpose of effecting such vesting, that those statutes were enacted. Now it is not certain that the main purpose of the sweeping statutory changes effected by the Revised Statutes failed to include within its scope the very proposition covered by this subdivision. But assuming that that result was

¹ *Fowler v. Ingersoll*, 127 N. Y. 472, 477.

not especially in the minds of the Revisers or the Legislature, it is still to be noticed that we are looking, in this discussion, not merely at the primary purpose of the enactment, but also at the necessary legal results which do in fact flow therefrom, one of which obviously is that unless the scheme of disposition is so framed that by the end of the "statutory period" the trust must cease and the remainder thereon must, if ever, take effect, both trust and remainder will be void.

§ 347. Nor indeed would it impair the force of this conclusion to assert that the remainder in such a case is void merely for the reason that it is necessarily carried down by the failure of the precedent estate on which it is limited, and not at all for the direct reason that the vesting of the remainder is unduly postponed.¹ For here again we should regard the actual legal result, and if, as is true, a remainder limited on such a precedent trust estate, is void unless so limited that it must take effect in possession, if ever, by the end of the "statutory period," that fact constitutes complete support for Rule II as applied to such remainders, even though the immediate reason for their invalidity is found in the failure of the precedent estate. The reason is one thing, and the actual result, which is what Rule II undertakes to express, is another.

§ 348. Thus far we have discussed cases where the future estate is not intended to vest at all except upon the assumed condition that the precedent estate is valid and shall first run through a term. But now, if the future estate should be limited, as it might be, to take effect at an appointed time not measured by the statu-

¹ As to which, however, see *Everitt v. Everitt*, 29 N. Y. 39, 81; *U. S. Trust Co. v. Hogencamp*, 191 N. Y. 281, 285; *Williams v. Jones*, 166 N. Y. 522, 537; *Kalish v. Kalish*, 166 N. Y. 368; *King v. Whaley*, 59 Barb. 71, 78.

tory period, and irrespective of whether the intermediate trust estate were valid or void, then the validity of the future estate would depend on whether it should be classified as a "remainder," in the sense of the statutes under consideration, or as analogous thereto, and so rendered subject to the principles embodied in Rule II, or not a "remainder" in that sense, and so not subject to those principles.¹

§ 349. In *Greenland v. Waddell*,² there was a testamentary express trust to receive and apply the income of personal property to B, for life, and thereafter to pay the income to such children as B might leave surviving, to continue until the youngest of them to arrive at the age of twenty-one should reach that age; and then to pay over the corpus to such children of B, if any, should then be surviving; or if all those children should die under age, then to V and S. Thus, if B should leave any children surviving, the contingency would not be such as could by any possibility cause a suspension of the power of alienation. At the death of B, all the persons (namely, the children of B if any, and V and S or their successors in interest) who could thereafter acquire the remainder under the terms of the instrument, would be ascertained persons in being. The contingency would consist solely in the uncertainty as to whether those children, or some of them, on the one hand, or V and S on the other, would be the ones who would take. Accordingly, they could all, by joining,

¹ There is another class of remainder-like interests following after trust estates, namely, where the trust is to sell, or to sell, mortgage or lease, under Real Prop. L., § 96, and some or all, as the facts may be, of the proceeds, or proceeds after payment of debts, are given or bequeathed. Here there is a sort of remainder, § 214, *supra*, in personal property, but it is limited on a fee, and subject to the statutes above quoted, and no difficulty is presented. *Briggs v. Davis*, 21 N. Y. 574.

² 116 N. Y. 234.

transfer absolute ownership in the remainder, but for one fact which rendered those gifts invalid,—namely, that the uncertainty as to which ones would become entitled at last, must continue until all the children either came of age, or earlier died. Thus the only possible ground for the invalidity of the remainders, as found by the court, consisted in the undue postponement of absolute vesting. They had been given to take effect only at the time fixed for the expiration of a term not duly restricted to the statutory period. The property in question was personalty, and the undue “suspension” which, as the court found, invalidated the remainders, was, as expressly set forth in the opinion, a “suspension of absolute ownership,”—a term which includes postponement of vesting, and it was evidently, and on the facts necessarily, in that sense that the term is there employed. “If they [the children of B] do not [reach the age of twenty-one years] the fact that the direction is that the fund go to Mr. Boerum and Mrs. Vandever [V and S] is not consistent with the vesting of absolute ownership in the children on the death of their mother [B].”¹

§ 350. In *Knox v. Jones*,² there was an express trust to receive and apply income, which must continue during the lives of A, B, and C, and thus during all that time it would operate to suspend alienability, and was therefore invalid. As to the remainder, however, it was given to such children of B, if any, as should be living at the end of the three lives, and if no children of B were then living, then to Columbia College. Now at the death of B,—that is, the expiration of one life,—one or the other of two possible situations must exist;

¹ *Greenland v. Waddell*, *supra*, p. 244. *Matter of Wilcox*, 194 N. Y. 288, 304.

² 47 N. Y. 389.

that is, either no surviving children of B, in which event Columbia College would, on the theory of the instrument, be the only remainderman, and could alien the remainder; or, surviving children of B, in which case the total membership of the group of possible remaindermen would be known, namely, those children and Columbia College. B having died, there could be no new members of the group. Thus Columbia College, and such children of B, owning amongst them all possible interests in the remainder, could, assuming the remainder to be otherwise valid, alien the same absolutely. And so at the death of one person in being the remainder, so far as valid at all, must become absolutely alienable, and could not be considered void on that ground. But although thus alienable, the remainder, in case of B's death leaving children surviving, might not become absolutely vested, even in interest, until the death of A, B and C, for until then it might not be known which of the several remaindermen would be the particular ones in whom it would vest at last. The remainder, also, was intended to vest in possession only upon the natural expiration of a trust intended to endure for three lives. The trust being void, the *event* upon which the remainder was to vest could never occur, and the remainder fell with the trust.

§ 351. In *Matter of Howland*,¹ there was a disposition of property to be held in trust in shares, one for each of testator's grandchildren until it reached the age of twenty-one, and then to be paid over to it, and in case a grandchild died before that age, then to the survivors or survivor who should reach majority. The court assumed for the purposes of argument that the only grandchildren referred to were the three who were living at testator's death, and still held the scheme

¹75 App. Div. 207.

invalid, apparently on the ground that while the trust was only for one life as to each share, the absolute vesting of all shares in the remainder might not be determined until three persons had come of age or earlier died. As the opinion states, "An ownership liable to be divested by any contingency arising under the instrument creating the ownership, is not absolute." And even if the true construction of the testamentary disposition in that case is, that the trust might continue as such, beyond the statutory period, and that it was for that reason that the scheme was invalid, it is still true that if the plan of the trust and remainders had been so arranged that as to each share the trust would cease and the remainder must absolutely vest by the end of the "statutory period," the remainders would have been valid, and unless so arranged the remainders would be void, a proposition which includes the doctrine embodied in Rule II.

Remainder on Execution of Power.

§ 352. This subdivision relates to the case where, through the presence of some express trust or contingency, there would be a suspension, for a period not duly measured, as for example for five years, of the absolute power of alienation, but that the suspension is obviated by the accompanying presence of a power, exercisable at any time, to partition and convey, or to sell and distribute, or in some other way to effectuate the absolute vesting of all estates and interests.¹

§ 353. In such a case, the remainder or other like interest in the property or its proceeds, which is to take effect in possession when the power shall be exercised, may itself be contingent until that time, and the particular proposition here to be considered is, that the exist-

¹ Matter of Wilcox, 194 N. Y. 288; §§ 42 *et seq.*

ence of the power, sufficient to negative suspension of the power of alienation, does not have any similar effect upon such postponement of vesting. For under the statutes already discussed, the remainder, to be valid, must be so limited that it must vest in interest, if ever, by the end of the statutory period. And so, although the precedent estate is freed from suspension of the power of alienation, it does not necessarily follow that a remainder in the real property or the proceeds, limited to vest only upon the actual exercise of the power, is also valid.¹

§ 354. The explanation of this fact, that a power which operates to obviate suspension of the power of alienation, does not necessarily operate to also render valid the contingent remainder, is this: The Rule relating to the power of alienation deals only with *ability to effectuate* a specified result, but the Rule relating to vesting deals with the *actual accomplishment* of a different specified result. Under the one, the *power* to alien must not be unduly suspended; under the other, *actual vesting* must not be unduly postponed. Under the first, the existence of the power of alien, even though not exercised, satisfies the demand for ability to effect the vesting of an absolute fee in possession; under the second, it is not the ability to effectuate vesting in possession, but the actual accomplishment of vesting in interest, that is demanded. To obviate suspension of the power of alienation, it is only necessary to show that there are persons in being who can convey an absolute fee in possession. If they can alien, there is obviously no suspension of the power to alien. The difference between the two Rules is the difference between “may” in the sense of “can,” on the one hand, and “must” on the other. Nor is it in any way in-

¹ Matter of Wilcox, 194 N. Y. 288.

consistent with these propositions to further state, as has been done in earlier sections, that a suspension of the power of alienation, to be valid, is required to be such that it not only may, but must, cease by the end of the statutory period. The suspension must cease; and all that is necessary to insure its doing so in due time is to provide for the existence, by the end of the statutory period, of the power to alien. As soon as an absolute fee in possession can be conveyed, any suspension of the power of alienation ceases to exist. But with regard to the vesting in interest of remainders the case is different. For they, to be valid, must be so limited that they must actually vest, if ever, by the end of the statutory period.

§ 355. Thus in the general class of cases under consideration in this subdivision, the existence of the power in question, while obviating suspension of alienability as to the present trust estate, because under it an absolute fee can be conveyed, furnishes no assurance that it will be exercised during the "statutory period," and so no assurance that the time for the vesting in interest, if ever, of the contingent remainder, will arrive by the end of that period. The power can be exercised at any time, and thus obviates suspension of the power of alienation, but it may not be exercised until the end of the five years, and so the remainder may remain contingent during all that time, and is therefore invalid for undue postponement of vesting.

§ 356. But it is, of course, only where a remainder may thus continue contingent for a term not duly measured by lives, that it is invalid on account of undue postponement. If it is all the time absolutely vested, or is all the time certain to become so by the end of the statutory period, whether the continuing power is then exercised or not, the existence of such a power does not render it invalid, for in such a case there is no

suspension of the power of alienation, and no undue postponement of vesting, and accordingly Rule I and Rule II are both satisfied.

§ 357. In *Henderson v. Henderson*,¹ property, real and personal, was vested in testator's children (of whom there were more than two), in equal shares, subject to a power (the exercise of which the grantee of the power was authorized, but not required, to postpone for five years), "to partition, divide and apportion equally among all my children living at the time of making such partition and division, and the child or children of such of my children as may then be dead, leaving issue (the latter to take the share their parent would have taken if living).² * * * And provided, further, that, if any of my said children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have taken if living." There was also a discretionary power of sale for the purpose of effecting the apportionment.

§ 358. The difficulty with this scheme lay solely in the parenthetical clause "who shall be living at the time of such partition." At the death of any child of testator, leaving children surviving, the remainder in its share would vest in those children, in equal sub-shares, but, on account of that clause, such vesting would not be absolute. For pending the actual exercise of the power, each of those sub-shares would be subject, in case of the death of the grandchild of testator in whom it was then vested, to be divested in favor of its brothers and sisters, and so on, as long as the exercise of the power was delayed. In this way the

¹ 113 N. Y. 1.

² See the will as given in 46 Hun, 509, 511.

parenthetical clause in question provided for numerous contingent interests in the nature of remainders, which might not vest by the end of any duly measured period.¹ This clause was held void for illegality. But its invalidity was not due to any undue suspension of alienability. There was no disposition, in any event whatever, to any persons not in being by the end of one life in the case of each share, or incapable of alienating all interests, and therefore only the grandchildren of testator, in whom any given share would vest at their parent's death, need be considered. The fact that their sub-shares might be divested one in favor of another, could not interfere with alienability. By all uniting, after their parent's death, they could convey all such interests as they had amongst them, and there were no other interests elsewhere that could not also be alienated. The only doubt introduced by this clause was, as to which of the children of a deceased child would be the ones to ultimately acquire his share absolutely. Thus though the contingency did not introduce any inalienability, it did involve an undue postponement of absolute vesting, and it is on this ground that its invalidity must be based. Cullen, J., in the court below,² gave that as the reason for the invalidity, and found the whole scheme void. The Court of Appeals,³ held the clause void but cut it off, and thus sustained the rest of the scheme.

§ 359. Now this view of *Henderson v. Henderson*, would be opposed by those who believe that there is no general rule against undue postponement of vesting. An explanation from that standpoint has, indeed, been offered, and apparently consists in the proposition that it was not merely the children of a deceased child of

¹ Thus contrasting with *Bowditch v. Ayrault*, 138 N. Y. 222.

² 46 Hun, 509.

³ 113 N. Y. 1, 15.

testator, but any of his descendants, however remote, who might, upon actual partition within five years, become entitled as purchasers, with the result that the class entitled to a given share might be constantly opening to let in new members not living at the death of the child of testator to whom the share was first given, and that thus the power of alienation might be suspended during five years.

§ 360. But that construction has, on the facts of the case, certain controlling arguments against it. "Nothing is better settled in the law of wills than that the term 'children' does not include grandchildren or more remote descendants, unless there is something in the will to show that the word was used in a broader sense."¹ There is nothing here to show a broader meaning, unless it is the word "issue." But as to that word, there is a strong tendency, unless restrained by the context, to hold that it has the meaning of children. It will at least be held to have such meaning upon a slight indication in other parts of the will that such was the intention of the testator. The use of it in connection with the word children, tends to define it in that sense.² This principle applies to such a provision for the issue of a child of testator, thus confining it to testator's grandchildren.³ And one of the chief considerations, in determining the meaning of such terms, in case of doubt, is found in the bearing of a given construction upon the resulting validity or invalidity of the provision, as for example in connection with the period of suspension of the power of alienation. "Where the intent of the testator is left uncertain and

¹ *Pimel v. Betjemann*, 183 N. Y. 194, 200; *Matter of Keogh*, 126 App. Div. 285, aff'd. 193 N. Y. 603; *Davies v. Davies*, 129 App. Div. 379, aff'd 197 N. Y. 598.

² *Palmer v. Horn*, 84 N. Y. 516, 519, 520; *Chwatal v. Schreiner*, 148 N. Y. 683, 687; *Clark v. Kittenplan*, 63 Misc. 122, 128-9.

³ *Id.*

doubtful, that construction should be adopted which is nearest in accord with public policy.”¹

§ 361. And this brings us to another reason for believing that the court, in *Henderson v. Henderson*,² construed the term “children” as excluding grandchildren of testator’s children, and thus as not causing any undue suspension of the power of alienation, and therefore held the future interests void not on that ground, but on the ground of undue postponement of vesting. For the contrary view would amount to this: That the court, in that case, without mentioning the point, or explaining why it departed from the ordinary rules, did proceed on the theory that “children” of a deceased child, included grandchildren of the deceased child, yet to be born even after the death of testator’s child, and then proceed to hold the gift void for undue suspension of the power of alienation, when by following the usual rules of construction they would (on the theory involved in the view under consideration that there is no such thing as invalidity due to mere postponement of vesting), have been able to sustain the gifts as valid. But this is exactly the line of reasoning which is never followed.³ On the other hand, if we assume, as we must under the circumstances, that they did adopt the usual rules of construction, we find that there was no possibility of the appearance, as purchasers, after one life as to each share, of any persons not theretofore in being, and accordingly the invalidity was necessarily predicated solely upon mere postponement of vesting.

§ 362. This view is fully confirmed by the express

¹ Id. *Wilber v. Wilber*, 165 N. Y. 451, 456.

² *Supra*.

³ § 446 *infra*.

statement of the court. For the opinion states that "Under the statute every future estate, which may not vest within the period of two lives in being at the time of its creation, is void."¹ And in *Matter of Wilcox*,² the will in *Henderson v. Henderson* is thus construed, and the court say that "in that case it is entirely apparent there was no suspension of the power of alienation as to the share of any child, except during the life of that child, for on its death all its issue by joining together could transfer or convey an absolute title." *Henderson v. Henderson*, therefore, illustrates the principle embodied in Rule II.

§ 363. These views are all confirmed by the decision in *Robert v. Corning*,³ where, on the basis of one essential difference in the facts, but pursuant to the same principles already discussed, the future interests in the proceeds of sale under the power were sustained. In that case there was a precedent estate which was to continue until the exercise, which might be effected at any time not later than three years, of a power of sale and equal division and distribution, among testator's children; if any died before distribution, leaving issue, the issue were to take the parent's share; if the deceased child left no issue, the share was to go to testator's other children. The facts pertinent to the present discussion were the same as in *Henderson v. Henderson*,⁴ except for this: that the gift over to the children of a deceased child was, at the parent's death, to vest not defeasibly as attempted by the void clause in *Henderson v. Henderson*, but absolutely. The ultimate vesting was to take place, as to each share, by the end of one life, and so the remainders were valid.

¹ *Henderson v. Henderson*, 113 N. Y. 1, 15.

² 194 N. Y. 288.

³ 89 N. Y. 225.

⁴ *Supra*.

§ 364. Another illustration, involving a precedent express trust which, by itself, would have occasioned a suspension of the power of alienation during a term not duly measured by lives, and a power which because exercisable at any time during that term, obviated the suspension, and a contingent future interest which was only to vest upon the actual exercise of the power, and would therefore be held void, is found set forth in the opinion of Cullen, J., in *Matter of Wilcox*.¹

Remainder in Default of Appointment.

§ 365. Remainders in default of appointment are illustrated by the facts in many cases,² present no peculiarities calling for special attention here, and are mentioned merely as one of the general class of cases where the limitation, to be valid, must comply with the principles embodied in Rule II. But "the existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power."³

Remainder to a "Class."

§ 366. Gifts of real or personal property to a "class" may be so limited as to remain contingent until the

¹ 194 N. Y. 288, 305. See also the discussion of *Underwood v. Curtis*, 127 N. Y. 523, 541, *infra*, §§ 400-411.

Illustrations of the principles underlying the distinction between vested and contingent remainders or interests, as affected by the presence of a power or direction to convey them, or to sell and distribute the proceeds, are to be found in *Matter of Brown*, 154 N. Y. 313; *Campbell v. Stokes*, 142 N. Y. 23; *Moore v. Appleby*, 108 N. Y. 537; *United States Trust Co. v. Roche*, 116 N. Y. 120, 131; *Townshend v. Frommer*, 125 N. Y. 446; *Duvall v. English* E. L. Church, 53 N. Y. 500, 503; *Salisbury v. Slade*, 160 N. Y. 278; *Goebel v. Wolf*, 113 N. Y. 405; *Knowlton v. Atkins*, 134 N. Y. 313, 321; *Dana v. Murray*, 122 N. Y. 604; *Real Prop. L.*, § 41, quoted § 365, *infra*.

² *Genet v. Hunt*, 113 N. Y. 158; *Matter of Haggerty*, 128 App. Div. 479, *aff'd* 194 N. Y. 550; *Dana v. Murray*, 122 N. Y. 604; *Gray, Perpetuities*, 2nd Ed., § 112.

³ *Real Prop. L.*, § 41.

time comes for the closing of the class, and the consequent final determination of the membership and the share of each member, or may in the meantime vest, subject to partial divesting upon the entrance of new members, or to total divesting in case of death or other specified contingency.¹

§ 367. If a remainder to a class is contingent and the contingency upon the happening of which the vesting in interest is, if ever, to take place, may happen at any time during a period not duly measured, the entire remainder is void. If a remainder is so limited that it must vest in interest, if ever, free from further defeasance, by the end of the statutory period, it is, upon that contingency, valid.² If it must vest in interest, if ever, by the end of the statutory period, but might still be subject to total or partial defeat during a term not duly measured, while the class still remained open, then the vested interest would be sustained, and

¹ *Matter of King*, 200 N. Y. 189; *Matter of Hoffman*, 201 N. Y. 247, 255; *Matter of Allen*, 151 N. Y. 243, 247; *Herzog v. Title Guarantee and Trust Co.*, 177 N. Y. 86, 97; *Murray v. Miller*, 178 N. Y. 316, 325; *Matter of Kimberly*, 150 N. Y. 90, 93; *Matter of Russell*, 168 N. Y. 169; *Roosa v. Harrington*, 171 N. Y. 341, 353; *Matter of Crane*, 164 N. Y. 71, 76; *Matter of Brown*, 154 N. Y. 313, 326; *Matter of Baer*, 147 N. Y. 348; *Bisson v. W. S. R. R. Co.*, 143 N. Y. 125; *Moffett v. Elmendorf*, 152 N. Y. 475; *Matter of Smith*, 131 N. Y. 239; *Teed v. Morton*, 60 N. Y. 502, 506; *Delafield v. Shipman*, 103 N. Y. 463; *Rudd v. Cornell*, 171 N. Y. 114, 122; *Schlereth v. Schlereth*, 173 N. Y. 444, 452; *Gilliam v. Guaranty Trust Co.* 186 N. Y. 127, 133; *Delaney v. McCormick*, 88 N. Y. 174, 183; *Vincent v. Newhouse*, 83 N. Y. 505, 511; *Hobson v. Hale*, 95 N. Y. 588, 616; *Matter of Embree*, 9 App. Div. 602, *aff'd* 154 N. Y. 778; *Haug v. Schumacher*, 166 N. Y. 506; *Jacoby v. Jacoby*, 188 N. Y. 124; *Campbell v. Stokes*, 142 N. Y. 23; *Stevenson v. Lesley*, 70 N. Y. 512; *Byrnes v. Stilwell*, 103 N. Y. 453; *Monarque v. Monarque*, 80 N. Y. 320; *Henderson v. Henderson*, 113 N. Y. 1; *Robert v. Corning*, 89 N. Y. 225; *Greenland v. Waddell*, 116 N. Y. 234; *Tucker v. Bishop*, 16 N. Y. 402; *Burrill v. Sheil*, 2 Barb. 457; *Bascom v. Weed*, 53 Misc. 496; *Tayloe v. Gould*, 10 Barb. 388; *Butler v. Butler*, 3 Barb. Ch. 304.

² *Bowditch v. Ayrault*, 138 N. Y. 222; and cases above cited.

the illegal clause or feature leading to subsequent divesting be cut off;¹ unless such a course would not be consistent with the intent of the creator of the estate or interest, in which case the whole scheme, so far as inseparable, would be defeated.²

The "Statutory Period" for Postponement.

§ 368. Under the statutes above referred to, the maximum "statutory period" allowed for postponement of vesting, is in all cases two lives in being at the creation of the estate, except under the special circumstances, relating only to real property, and set forth in Real Property Law, § 42, where a further minority is allowed for final vesting.

¹ As in Matter of Ryder, 41 App. Div. 247; Henderson v. Henderson, 113 N. Y. 1.

² Chapter X. See also Lewis, Perpetuities, Chapters V, VI; Marsden, Perpetuities, Chapters XVII, XVIII.

CHAPTER VII.

PERSONAL PROPERTY.

RULE III. ABSOLUTE OWNERSHIP.

The General Statutory Provision.

The Meaning of Absolute Ownership.

SUSPENSION BY CONTINGENCIES.

SUSPENSION BY EXPRESS TRUSTS.

SUSPENSION BY POWERS.

THE STATUTORY PERIOD.

Rule III. Absolute Ownership.

§ 369. **Rule III.** THE ABSOLUTE OWNERSHIP OF PERSONAL PROPERTY SHALL NOT BE SUSPENDED BEYOND THE STATUTORY PERIOD.

The General Statutory Provision.

§ 370. "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." Pers. Prop. L. § 11.

§ 371. The maximum period allowed for suspension of the absolute ownership of personal property is thus "two lives in being," without any exception, (save the provision in Real Prop. L. § 49, applying the real property rule to "limitations of chattels real," "so that the

absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee").¹

The Meaning of "Absolute Ownership."

§ 372. There are several peculiar features noticeable in the statutory provision above quoted, a study of which will show the harmony among certain decisions which might otherwise appear to be inconsistent.

§ 373. One of the corresponding statutory provisions in relation to real property,² deals with "suspension of the absolute power of alienation," defines such suspension as consisting in the absence of persons in being who can convey an absolute fee in possession, and restricts the maximum authorized term of suspension to a period there defined. The principles thus established are embodied in Rule I, relating to Alienability.³ If the fee is thus alienable, there is no suspension of the absolute power of alienation. In regard to real property, also, there is a further requirement that a remainder, in order to be valid, must be so limited that by the end of the same "statutory period," if ever, it must vest in interest, as set forth in Rule II, relating to Vesting. The "statutory period" thus referred to in both the real property Rules, is two lives in being, with a further term of minority in certain specified exceptional cases.

¹ *Manice v. Manice*, 43 N. Y. 303, 381; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 216; *Greenland v. Waddell*, 116 N. Y. 234, 245; *Read v. Williams*, 125 N. Y. 560, 567; *Matter of Wilcox*, 194 N. Y. 288, 306; *Banks v. Phelan*, 4 Barb. 80; *Strang v. Strang*, 4 Redf. 376; *Estate of Thomas, Tucker*, 367; *Thompson v. Thompson*, 28 Barb. 432; *Tayloe v. Gould*, 10 Barb. 388; *Richards v. Moore*, 5 Redf. 278; *Jansen v. Cairus*, 3 Barb. Ch. 350, 356; *Thompson v. Clendening*, 1 Sandf. Ch. 387.

² Real Prop. L., § 42.

³ *Supra* § 1.

§ 374. But when, on the other hand, we turn to personal property, we find that these two subjects of alienability and vesting are both dealt with not, as in the case of real property, in separate statutory provisions, but in the one statutory provision quoted in the preceding section.

§ 375. This statutory provision consists of two sentences. The first sentence employs, to designate and comprise the two subjects of alienability and vesting thus to be dealt with, the single term "absolute ownership," and prohibits the suspension of such absolute ownership for a longer period than two lives in being, with no provision, as in the case of real property, for a further minority. The second sentence renders applicable to future or contingent interests in personal property, in respects other than that dealt with in the first sentence, the rules relating to future estates in real property. It is the first sentence only which specifically refers, in terms, to suspension of absolute ownership, and its prohibition of suspension beyond the statutory period of two lives applies to such suspension effected by "any limitation or condition" whatever. It also is confined to the subject of suspension of absolute ownership, and its limitation of the permitted term is absolute and complete.

§ 376. But here an odd circumstance tends to obscure the true relations of the first sentence of the statute with its second sentence. For it will be noticed that in the case of real property the word "suspended" is employed with reference to alienability only, because merely forming a part of the phrase "the absolute power of alienation shall not be suspended * * * ." By themselves alone the words "suspended" and "suspension" would not be thus confined to the subject of alienability. It is only when we look to see what suspension

is referred to, that we thus find, in the case of real property, that the statute in question is dealing with suspension of the power to alienate. Now the same word "suspended" is also used in the statute relating to personal property. That statute also, like the one dealing with real property, prohibits "suspension" beyond a designated term. But in looking, in that connection, to see what suspension is referred to, we find that it is no longer restricted to suspension of an absolute power to alienate, but that what is prohibited, beyond the designated term, is a suspension of "absolute ownership," which obviously includes more than mere alienability.

§ 377. Although at first sight, therefore, and on account of the presence of the word "suspended," it might seem that the first sentence dealt with alienability only, and not at all with postponement of vesting, and thus corresponded, as to its subject, to Rule I in relation to real property, while the second sentence dealt with postponement of vesting, and not with alienability, and thus corresponded, as to its subject, to Rule II in relation to real property, yet further examination shows that the two sentences cannot thus be allotted respectively to these two topics. For example, it is only in the first sentence that there is any reference to the fixed maximum term of two lives in being as distinguished from the real property term of two lives and in certain cases a further minority; so that if the first sentence dealt only with alienability, and the only provision in relation to postponement of vesting were to be found in the second sentence, the authorized term of postponement of vesting would, as in the case of real property, be two lives in being and in certain cases a further minority. But it is settled that the maximum authorized term for the postponement of vesting of future estates, or interests, in personal property, is two lives only. The sole possible basis for this limitation to two lives

only, is to be found in the first sentence of the statute, and in that sentence it is the term of suspension of "absolute ownership" which is thus limited. The conclusion is, then, inevitable, that the term "absolute ownership" is not confined to alienability only, but also includes vesting; and that "absolute ownership" does not exist unless all interests in the property are both alienable and vested.¹

§ 378. In this view of the statutory provision under consideration, its second sentence is to be understood as excluding from its terms any provision in regard to the authorized term of inalienability or the authorized term of postponement of vesting, and to be confined to providing that "in other respects [than that relating to the statutory period for suspension of absolute ownership, just provided for in the first sentence,²] limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property." These "other respects," for example, include the only provisions as to *what shall happen* if an attempt is made to suspend the absolute ownership for more than two lives in being. The first sentence merely says that it shall not be unduly suspended, but it is the provisions of the Real Property Law, incorporated in the second sentence by the reference to "other respects," that prescribe the results that follow an attempted undue suspension of alienability or postponement of vesting. So, generally, the "other respects" cover all matters not relating to the permitted length of term.³

¹ Matter of Wilcox, 194 N. Y. 288; Steinway v. Steinway, 163 N. Y. 183; Hone v. Van Schaick, 7 Pal. 221; Matter of Howland, 75 App. Div. 207; Greenland v. Waddell, 116 N. Y. 234, 235. See also Chapter VI.

² Stringer v. Young, 191 N. Y. 157, 162; Gilman v. Reddington, 24 N. Y. 9, 13.

³ Matter of Wilcox, 194 N. Y. 288.

§ 379. Thus understood, the meaning of the entire statutory provision is the same as if it were recast as follows: Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property, including, among other things, the rule in relation to suspension of the absolute power of alienation and the rule in relation to postponement of vesting, both of which topics are comprised, in the case of personal property, in the term "suspension of absolute ownership;" *except*, that such absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being, etc. It is only upon this theory, that the different parts of the statutory provision above quoted can be rendered consistent and rational in their relation to one another. The statute therefore embodies in one section, the two rules against undue suspension of alienability and against undue postponement of vesting which, in respect to real property, are found embodied (with one exception as to a possible added term in certain cases), in two different sets of statutory provisions. This view is abundantly and firmly established by the decisions.¹

§ 380. Upon the subject under discussion, however, it is possible to find remarks in the reported opinions of the courts, which are not, as a matter of phraseology, entirely in harmony. In most instances the apparent lack of harmony disappears when the scope of the remarks is ascertained from the state of facts in connection with which they were made. They may be grouped as follows:

§ 381. (1) One class of statements deals with "ab-

¹ *Matter of Wilcox*, 194 N. Y. 288, and cases above cited.

solute ownership" as consisting solely in absolute alienability. Thus it has been said that "it is perfectly well settled that there can be no suspension of absolute ownership when there are persons in being who can convey an absolute title."¹ Indeed, similar detached statements could be cited with reference to real property, as if the rule against undue suspension of the power of alienation were the only one to be reckoned with.² With one exception, the cases cited did not involve any question of the effect of postponement of vesting, upon absolute ownership, and their statements clearly relate only to the subject of alienability.³ The point seems to have been squarely presented, however, in *Sawyer v. Cubby*,⁴ where the court say that "The statutory test of what constitutes a suspension * * * of absolute ownership as to personal property, is that it occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed." The later decisions unfortunately throw no light on the exact bearing of this statement, for during the fifteen years since *Sawyer v. Cubby*, was decided, it has never been mentioned by the Court of Appeals, and never, on the point now under consideration, by the Appellate Division.⁵ It is not to be assumed that the case is inconsistent, for example, with the

¹ *Wells v. Squires*, 117 App. Div. 502, aff'd 191 N. Y. 529; *Williams v. Montgomery*, 148 N. Y. 519, 525-6; *Sawyer v. Cubby*, 146 N. Y. 192, 198; *Emmons v. Cairns*, 3 Barb. 243, 244-5; *Brown v. The Mutual Trust Co.*, 22 Weekly Dig. 395.

² *Mills v. Mills*, 50 App. Div. 221; *Murphy v. Whitney*, 140 N. Y. 541.

³ *Wilber v. Wilber*, 165 N. Y. 451; *Matter of Bray*, 118 App. Div. 533.

⁴ 146 N. Y. 192, 198.

⁵ None of the five opinions which have cited it had this question to deal with. *Matter of Lally*, 136 App. Div. 781, 785; 198 N. Y. 608; *Burke v. O'Brien*, 115 App. Div. 574, 576; *Matter of Roberts*, 112 App. Div. 732, 735; *Haug v. Schumacher*, 50 App. Div. 562, 568; 166 N. Y. 506; *Wilber v. Wilber*, 45 App. Div. 158, 161; 165 N. Y. 451.

views expressed in *Matter of Wilcox*.¹ But if it is, it would have to be looked on as overruled.

§ 382. (2) A second group of statements seems to suggest that while absolute alienability is not enough, in itself, to insure absolute ownership, yet it will not be sufficient to add merely the further factor of vesting, but that still a third factor is essential, namely, that the property must be not only alienable but alienable by the particular person who is entitled to the enjoyment of it. Some sentences of the opinion in *Underwood v. Curtis*,² convey this idea. The case is fully considered elsewhere,³ and it is believed that it does not in reality support any such doctrine. It may here be noticed that the two theories of "absolute ownership" referred to in the present and in the preceding paragraph, are wholly inconsistent, and cannot stand together.

§ 383. (3) The third group comprises cases that treat "absolute ownership" as involving two factors only, namely alienability and vesting. In order that the absolute ownership of property should not be suspended, all interests in it must be both alienable, and vested. This is the principle clearly established by the statutes and decisions.⁴ If any interest is not alienable, or is contingent, the ownership is not absolute. If all interests are both alienable, and vested, the ownership is absolute. Beyond this, there are no further requirements. Nor does the fact that some interest is contingent or inalienable, and that the resulting suspension of absolute ownership is not duly restricted within

¹ 194 N. Y. 288.

² 127 N. Y. 523.

³ § 400 *et seq.*

⁴ *Matter of Wilcox*, 194 N. Y. 288.

two lives in being, necessarily vitiate the entire scheme of disposition of which it forms a part. This latter point is discussed in Chapter X.

§ 384. Although, by its terms, the second sentence of the statutory provision above quoted applies to limitations of future or contingent interests, yet the courts do not confine themselves to such limitations in applying to personal property the rules relating to real property. For in many cases they have held applicable to present interests in personal property, by analogy, the rules relating to corresponding interests in real property. "Where there is no reason for a distinction in the nature of the property there is certainly great propriety in assimilating the rules governing dispositions of real and personal property."¹ The rules governing estates or interests in lands are, so far as practicable, applied to estates or interests of a like character in personal property;² and the term "estate" is frequently employed in reference to interests in personal property.³

§ 385. "Even if the provisions of the statute were not sufficiently comprehensive absolutely to require, as a peremptory injunction of statute law, their application in all their length and breadth, and in the same degree, to both classes of property, the argument to be derived from the general similarity of the legislative enactments, in regard to both classes of property; from the similar, if not equal mischiefs to be remedied, and from the general policy of the law, would authorize a court of equity, in the exercise of its acknowledged powers, to apply the same rule of construction to both."⁴ And

¹ Cook v. Lowry, 95 N. Y. 103, 111.

² Fargo v. Squiers, 154 N. Y. 250, 258.

³ *Supra*, § 216.

⁴ Graff v. Bonnett, 31 N. Y. 9, 13; Mills v. Husson, 140 N. Y. 99, 105; Cutting v. Cutting, 86 N. Y. 522, 544; Cook v. Lowry, 95 N. Y. 103,

statutes relating to personal property may often likewise be applied by analogy to real property.¹

Illustrations of the application to dispositions of personal property, of statutory provisions relating specifically to real property, without other authorization than that furnished either by § 11 of the Personal Property Law, or by the principle of analogy, are to be found, for example, in the following cases: the statutory preference for tenancy in common, over joint tenancy;² the test of distinction between vested and contingent future estates;³ the provisions making up the rule that a remainder, to be valid, must be so limited that it will be certain to vest, if ever, by the end of the appropriate statutory period,⁴ as for instance the statute providing that not more than two successive estates for life can be created, and that any further attempted life estates will be eliminated, and that the ultimate remainder, if vested, will be accelerated;⁵ the provision that expectant estates, irrespective of whether they are vested or contingent, are alienable, devisable and descendible, for what they may, in the event, prove

110-111; *Cochrane v. Schell*, 140 N. Y. 516, 534; *Genet v. Hunt*, 113 N. Y. 158, 168; *Matter of Crossman*, 113 N. Y. 503, 510; *Steinway v. Steinway*, 163 N. Y. 183, 195, 196; *Bliven v. Seymour*, 88 N. Y. 469, 478; *Matter of Cooksey*, 182 N. Y. 92, 97; *Hutton v. Benkard*, 92 N. Y. 295, 305-6; *Fargo v. Squiers*, 154 N. Y. 250, 258; *Matter of Brown*, 154 N. Y. 313, 324; *Matter of Moehring*, 154 N. Y. 423, 427; *Stringer v. Young*, 191 N. Y. 157, 164; *N. Y. Life Ins. & T. Co. v. Livingston*, 133 N. Y. 125, 127-8; *Greenland v. Waddell*, 116 N. Y. 234, 242-3; *Williams v. Thorn*, 70 N. Y. 270; *Matter of Conger*, 81 App. Div. 493; *Smith v. Edwards*, 88 N. Y. 92, 103; § 272, *supra*.

¹ *Cochrane v. Schell*, 140 N. Y. 516, 534.

² *Matter of Kimberly*, 150 N. Y. 90, 93, and other cases cited in § 105 *et seq.*

³ *Steinway v. Steinway*, 163 N. Y. 183, 195.

⁴ *Matter of Wilcox*, 194 N. Y. 288 and other cases cited in Chapter VI.

⁵ *Matter of Conger*, 81 App. Div. 493.

to be worth;¹ the test of what constitutes alienability;² the principle that acts in contravention of the terms of a trust are forbidden and, as to those charged with notice, are void;³ the provision, even apart from a special statute, that the interests of the beneficiaries of certain trusts are not transferable;⁴ the statutes governing the rights of creditors of trust beneficiaries;⁵ the provisions giving to those entitled to the "next eventual estate," any "rents undisposed of" during certain periods of suspension of alienability;⁶ the principle that a trust to apply, or pay over, the rents, implies an authority to collect and receive them;⁷ that the bare legal title to property covered by an express trust does not vest in the beneficiary;⁸ that a trust ceases when its purpose ends;⁹ and the general abolition of powers as formerly existing, and the adoption of a new code covering the creation of powers and their construction and execution.¹⁰ The law in this latter field, in reference to real property, has been applied, for example, in the case of personal property, to

¹ Ham v. Van Orden, 84 N. Y. 257, 269-270.

² §§ 373-386.

³ McPherson v. Rollins, 107 N. Y. 316; Genet v. Hunt, 113 N. Y. 158, 168.

⁴ Stringer v. Young, 191 N. Y. 157, 164; Graff v. Bonnett, 31 N. Y. 9; Cochrane v. Schell, 140 N. Y. 516, 534; Mills v. Husson, 140 N. Y. 99, 105; Roosevelt v. Roosevelt, 6 Hun, 31, *et seq.*, *aff'd* 64 N. Y. 651.

⁵ Williams v. Thorn, 70 N. Y. 270; Graff v. Bonnett, 31 N. Y. 9; Cutting v. Cutting, 86 N. Y. 522, 544; Mills v. Husson, 140 N. Y. 99, 105, and other cases cited in § 62, note 4.

⁶ Cook v. Lowry, 95 N. Y. 103; Gilman v. Reddington, 24 N. Y. 9, 19; Mills v. Husson, 140 N. Y. 99, 104, and other cases cited in §§ 244, 245.

⁷ Knox v. Jones, 47 N. Y. 389, 396, compare Onondaga T. & D. Co. v. Price, 87 N. Y. 542, 547.

⁸ Knox v. Jones, 47 N. Y. 389, 396.

⁹ Mills v. Husson, 140 N. Y. 99.

¹⁰ Hutton v. Benkard, 92 N. Y. 295, 304; Cook v. Lowry, 95 N. Y. 103, 111.

the definition and classification of powers;¹ the formula or method of computing the maximum period of suspension effected by an instrument in execution of a power; the restrictions concerning the estate or interest to be given or limited;² the effect upon vesting, of the existence of a power of sale;³ the operation of an absolute power of disposition, in certain cases, in conferring an absolute title upon the donee of the power;⁴ and the provision that unless a contrary intent appear, a will purporting to convey all the property of a testator, passes all property which, by a power granted to him, he is authorized to devise or bequeath.⁵ On the other hand, there are statutes, such as those abolishing all trusts with specified exceptions; and allowing, in certain cases a further term of suspension or postponement of vesting, after two lives, which are inapplicable to the case of personal property.

§ 386. Such being the law, it remains to consider the particular circumstances under which absolute ownership may be suspended. And for this purpose, all classes of suspension, as in the case of real property, may be grouped under the headings of contingencies, express trusts, and powers.⁶ This statement and the cases cited, are more fully considered in the following paragraphs.

¹ *Matter of Cooksey*, 182 N. Y. 92, 97.

² *Fargo v. Squiers*, 154 N. Y. 250, 259.

³ *Matter of Brown*, 154 N. Y. 313, 324.

⁴ *Matter of Moehring*, 154 N. Y. 423, 427.

⁵ *Hutton v. Benkard*, 92 N. Y. 295, 304; *Mott v. Ackerman*, 92 N. Y. 539, 549; *N. Y. L. Ins. & T. Co. v. Livingston*, 133 N. Y. 125, *Pers. Prop. L.* § 18. References to illustrations of the application of statutes or principles relating to real property, to dispositions of personal property, are collected in the index, under the heading *Personal Property*.

⁶ *Haynes v. Sherman*, 117 N. Y. 433; *Brewer v. Brewer*, 11 Hun, 147; *aff'd as Bremer v. Penniman*, 72 N. Y. 603; *Everitt v. Everitt*, 29 N. Y. 39, 71 *et seq.*; 82 *et seq.*; *Steinway v. Steinway*, 163 N. Y. 183; *Matter of Wilcox*, 194 N. Y. 288.

Suspension by Contingencies.

§ 387. As distinguished from the case of suspension of the absolute power of alienation of real property, where contingencies, in order that they may, as such, occasion suspension, must be such as to prevent a transfer of absolute title, it is to be noticed that suspension of absolute ownership of personal property, by reason of the fact that that term relates both to alienability and to vesting, is occasioned by any existing contingency whatever.

§ 388. If the contingency is such as to prevent transfer of absolute title, then the suspension of absolute ownership may be said to be due, at least in part, to inalienability; and even if the contingency is such as not to interfere with alienability,¹ yet the suspension of absolute ownership still exists, and is due to the mere fact that some interest is not actually vested.² In the latter case, the suspension corresponds to what, in the case of real property, is designated not as suspension, but as postponement of vesting. So long as the right to personal property remains contingent, the ownership cannot be said to be absolute. As soon, however, as all interests vest and are also alienable, suspension of the absolute ownership ceases.

§ 389. The test of freedom from undue suspension of absolute ownership occasioned by a contingency, is found in the question whether the limitations are such that by the end of two lives in being all interests will certainly be alienable, and also will, by that time, either vest, or else, by the terms of their creation, cease to exist even as possibilities. For so long as it is uncer-

¹ *Ham v. Van Orden*, 84 N. Y. 257, 270; *Stringer v. Young*, 191 N. Y. 157, 164.

² *Matter of Wilcox*, 194 N. Y. 288.

tain which of several persons in being will, as the contingency may turn out, become absolutely vested, there is a suspension of absolute ownership, and if the term is not measured by two lives, an illegal suspension results, even though there is no trust and no absence of persons in being among whom vesting must result finally. Such a limitation is wholly void.¹

§ 390. "For a contingent limitation of a remainder in personal property to be valid, the contingency must be such as necessarily to occur within two lives in being at the death of the testator,"² or at the date of the instrument, other than a will, containing the limitation or condition.³ Inasmuch as the proposition is established that "the inhibition on the suspension of the power of alienation is not the sole rule against perpetuities, as to realty, it is evident that the term 'absolute ownership' as applied to personalty (Pers. Prop. L. § 11) must be interpreted in its ordinary and natural sense, and that the same is suspended where the title of one is defeasible in favor of another, and that neither one can be said to possess absolute ownership, even though both are in being at the time."⁴

§ 391. It will be noticed that this proposition does not mean that personal property cannot, like real property, be vested in interest subject to being divested. Such a disposition may be effected.⁵ What it does mean is, that so long as it is uncertain who may yet become

¹ *Greenland v. Waddell*, 116 N. Y. 234, 244-5. As to the effect of the mere existence of a present trust, with full power of alienation and distribution, see § 400.

² *Matter of Wilcox*, 194 N. Y. 288, 306.

³ *Personal Prop. L.*, § 11.

⁴ *Matter of Wilcox*, 194 N. Y. 288, 300; *Hone v. Van Schaick*, 7 Pal. 221; *Matter of Howland*, 75 App. Div. 207; compare *Sawyer v. Cubby*, 146 N. Y. 192; and other cases cited, *supra* §§ 379-382.

⁵ *Bowditch v. Ayrault*, 138 N. Y. 222, 229. Page 346, *infra*.

the absolute owner, even though all the persons who may do so are in being, and capable, amongst them, if the provisions were otherwise valid, of conferring absolute ownership, the "absolute ownership" is in the meantime suspended.¹

§ 392. And in *Steinway v. Steinway*,² the opinion, after calling attention to the fact that by 1 R. S. 773, § 1 (Pers. Prop. L. § 11), it is in other respects than the suspension of absolute ownership for not more than two lives in being that limitations of future and contingent interests in personal property are subject to the statutory provisions relating to real property, states that "the absolute ownership is suspended in one of two ways, either by the creation of future estates vesting upon the occurrence of some future or contingent event, or by the creation of a trust which vests the estate in trustees," and that such future estates, like future estates in real property, remain contingent "whilst the person to whom or the event upon which they are limited to take effect remains uncertain." It is the existence of a contingency due to the uncertainty either of the person, or of the event, which suspends "absolute ownership," as, in the case of real property, either class of uncertainty postpones vesting, and "suspension of absolute ownership," as caused by a contingency, is not confined, as in the case of suspension of the absolute power of alienation of real property, to the case of such contingencies as involve the absence of "persons in being" who can, amongst them,

¹ The same feature of vesting subject to being divested is also shown in the cases where title vests subject to open and let in new members, and thus effect a partial divesting of the title or interest of the earlier members, or a total divesting in case of death before final and absolute vesting. See also the cases relating in particular to gifts to a "class." The question of the extent to which defeasible vesting satisfies the Rule against suspension of absolute ownership, is considered in Chapter III.

² 163 N. Y. 183.

effectuate the transfer of an absolute title. And thus unless the contingency is restricted within the term of two lives in being, the absolute ownership is unduly suspended.¹

§ 393. It may follow that the necessity for vesting by the end of the statutory period may apply, in the case of personal property, not only to "remainders," (a term which is constantly employed in a sense corresponding to that of remainders in real property,²) but also to all future interests, such as may ripen into ownership; particularly if the same requirement of vesting in the case of real property shall come to be held applicable to future estates which are not literally remainders.³

§ 394. The tests to be applied in determining whether a given future estate or interest in personal property is in fact vested or contingent, are in general similar to those employed in relation to real property,⁴ including the controlling effect of intent.⁵ But the differences in the nature of personal property, and in the terms ordinarily used to dispose of it, have led to the

¹ *Matter of Wilcox*, 194 N. Y. 288.

² *Matter of Wilcox*, 194 N. Y. 288; *Matter of Brandreth*, 169 N. Y. 437, 442; *Bliven v. Seymour*, 88 N. Y. 469, 478; *Matter of Accounting of Denton*, 102 N. Y. 200; *Smith v. Van Ostrand*, 64 N. Y. 278; *Norris v. Beyea*, 13 N. Y. 273; *Tyson v. Blake*, 22 N. Y. 558; *Gray, Perpetuities*, 2nd Ed. 71-2; *Van Vechten v. Van Veghten*, 8 Pa. 104, 107; *Bergmann v. Lord*, 194 N. Y. 70, 76; *Matter of Ungrich*, 48 App. Div. 594, 596, *aff'd* 166 N. Y. 618.

³ Although the statute is not satisfied by mere alienability, as distinguished from vesting, yet personal property may in fact become alienable before it vests. *Ham v. Van Orden*, 84 N. Y. 257, 270.

⁴ *Pers. Prop. L. § 11*; *Steinway v. Steinway*, 163 N. Y. 183, 195; compare *Manice v. Manice*, 43 N. Y. 303, 380.

⁵ *Pers. Prop. L. § 11*; *Matter of Brandreth*, 169 N. Y. 437, 442; *Bowditch v. Ayrault*, 138 N. Y. 222, 229; *Matter of Seebeck*, 140 N. Y. 241; *Kilpatrick v. Barron*, 125 N. Y. 751, 754.

adoption of certain special principles of construction, which are set forth in Chapter XI.

Suspension by Express Trusts.

§ 395. There are express trusts of personal property which occasion a suspension of the absolute ownership,¹ and there are others which do not do so.² So far as concerns suspension as occasioned solely by an express trust, as such, this is purely a question of alienability, or in other words the presence or absence of persons in being who can transfer an absolute title.³

§ 396. Now in applying this principle of distinction, it is to be noticed that the statutes have not defined or restricted, as they have done in relation to real property, the purposes for which trusts of personal property may be created, and they may therefore exist for any purpose not in its nature unlawful.⁴

¹ Hooker v. Hooker, 166 N. Y. 156; Schey v. Schey, 194 N. Y. 368; Brewer v. Brewer, 11 Hun, 147, aff'd as Bremer v. Penniman, 72 N. Y. 603; Cochrane v. Schell, 140 N. Y. 516, 534; Everitt v. Everitt, 29 N. Y. 39, 71; 82 *et seq.*; Genet v. Hunt, 113 N. Y. 158, 168; Savage v. Burnham, 17 N. Y. 561, 572; Haynes v. Sherman, 117 N. Y. 433; Underwood v. Curtis, 127 N. Y. 523, 537; Simpson v. Trust Co. of America, 129 App. Div. 200, aff'd 197 N. Y. 586; Matter of Mount, 185 N. Y. 162; Schlereth v. Schlereth, 173 N. Y. 444; Mansbach v. New, 58 App. Div. 191, aff'd 170 N. Y. 585; Whitefield v. Crissman, 123 App. Div. 233; Stewart v. Woolley, 121 App. Div. 531.

² Wells v. Squires, 117 App. Div. 502, aff'd 191 N. Y. 529.

³ Wells v. Squires, 117 App. Div. 502, aff'd 191 N. Y. 529.

⁴ Cochrane v. Schell, 140 N. Y. 516, 534; Gilman v. Reddington, 24 N. Y. 9, 12; Gilman v. McArdle, 99 N. Y. 451; Stettheimer v. Stettheimer, 24 N. Y. State Rep. 70 (s. c. *sub nom.* Stettheimer v. Tone, omitting from opinion paragraph on this point, 114 N. Y. 501); Barry v. Lambert, 98 N. Y. 300; Hagerty v. Hagerty, 9 Hun, 175; Everitt v. Everitt, 29 N. Y. 39, 71; Matter of Carpenter, 131 N. Y. 86; Bork v. Martin, 132 N. Y. 280; Hirsch v. Auer, 146 N. Y. 13, 19; Tabernacle Church v. Fifth Ave. Church, 60 App. Div. 327, 334, aff'd 172 N. Y. 598; Devoe v. Lutz, 133 App. Div. 356; Matter of Wilkin, 183 N. Y. 104, 109; Johnston v. Hughes, 187 N. Y. 446; Clark v. Clark, 147 N. Y. 639; Montignani v. Blade, 145 N. Y. 111; Brown v. Spohr, 180 N. Y. 201; Neresheimer v. Smyth, 167 N. Y. 202;

§ 397. Among these possible forms of express trusts, the reason why certain of them do occasion suspension of absolute ownership is found in the provision of the Real Property Law, § 105, which is applicable as well to personal property,¹ that "If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as otherwise provided in this section, shall be absolutely void;" and in the provision of § 15 of the Personal Property Law that "The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. But the right and interest

Matter of Cornell, 170 N. Y. 423. Thus a trust of real and personal property, merely "for the benefit" of certain children, is void as to the realty and valid as to the personalty. *Hagerty v. Hagerty*, 9 Hun, 175; *Gilman v. McArdle*, 99 N. Y. 451, 456; *Everitt v. Everitt*, 29 N. Y. 39, 71. See also *Schneider v. Heilbron*, 115 App. Div. 720, 101 N. Y. Supp. 152; *Illensworth v. Illensworth*, 110 App. Div. 399. See as to trusts created by a deposit in a savings bank "in trust": *Martin v. Funk*, 75 N. Y. 134; *Beaver v. Beaver*, 117 N. Y. 421; *Cunningham v. Davenport*, 147 N. Y. 43; *Haux v. Dry Dock Savings Institution*, 2 App. Div. 165, aff'd 154 N. Y. 736; *Farleigh v. Cadman*, 159 N. Y. 169; *Matter of Totten*, 179 N. Y. 112; *Tierney v. Fitzpatrick*, 195 N. Y. 433; as to trust in estate for years, *Bennett v. Rosenthal*, 11 Daly, 91, 94. As in the case of real property, trusts of personal property cease when they reach a limit imposed upon them in their creation; and also, on general principles, whenever their purpose has failed. Duration of trust under general assignment for creditors. *Mills v. Husson*, 140 N. Y. 99, 105. So their creator may reserve a power of revocation. *Rosenberg v. Rosenberg*, 40 Hun, 91 (compare with *Pierson v. Drexel*, 11 Abb. N. C. 150).

¹ Personal Prop. L. § 11; *Cochrane v. Schell*, 140 N. Y. 516, 534; *Genet v. Hunt*, 113 N. Y. 158, 168; *Everitt v. Everitt*, 29 N. Y. 39, 71; *Bergmann v. Lord*, 194 N. Y. 70, 76; *Gilman v. Reddington*, 24 N. Y. 9, 15; *Fitzgerald v. Topping*, 48 N. Y. 438; *Horton v. Cantwell*, 108 N. Y. 255, 267; *Baltes v. Union Trust Co.*, 180 N. Y. 183; *Matter of Straut*, 126 N. Y. 201; *T. G. T. Co. v. C. B. & Q. R. R. Co.*, 123 N. Y. 37; *Matter of Logan*, 131 N. Y. 456; *Doane v. Mercantile Trust Co.*, 160 N. Y. 494; *Lockman v. Reilly*, 95 N. Y. 64; *Wetmore v. Porter*, 92 N. Y. 76; *Douglas v. Cruger*, 80 N. Y. 15; *Rhodes v. Caswell*, 41 App. Div. 229.

of the beneficiary of any other trust in personal property may be transferred.”¹

§ 398. As a general proposition, and apart from the fact that a personal property trust for accumulation is restricted as to its duration to not more than two lives in being, without exception,² the statute concerning accumulation of the income of personal property is substantially the same as that concerning accumulation of the rents and profits of real property.³

§ 399. By § 23 of the Personal Property Law, L. 1909, ch. 247, it is now, however, further provided that “Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.”⁴

¹ Wells v. Squires, 117 App. Div. 502, aff'd 191 N. Y. 529; Baltes v. Union Trust Co., 180 N. Y. 183, 186; Graff v. Bonnett, 31 N. Y. 9, 13; Campbell v. Foster, 35 N. Y. 361, 371, and cases cited; Genet v. Hunt, 113 N. Y. 158, 163; Lent v. Howard, 89 N. Y. 169, 181; Roosevelt v. Roosevelt, 6 Hun, 31, aff'd 64 N. Y. 651; Matter of Crossman, 113 N. Y. 503, 510; Gott v. Cook, 7 Pai. 521, 536; Cochrane v. Schell, 140 N. Y. 516, 534; Stringer v. Young, 191 N. Y. 157, 164. To the non-assignable class of trusts to receive and apply income, belong also trusts to receive and accumulate income. See §§ 189 *et seq.* See the obscure provision concerning insurance moneys, added to Pers. Prop. L., § 15, by L. 1911, Ch. 327. Cf. Dom. Rel. L., § 52.

² Pers. Prop. L. §§ 11, 16; Manice v. Manice, 43 N. Y. 303, 381; *supra*, Chap. IV. Cf. § 371.

³ Pray v. Hegeman, 92 N. Y. 508, 513; Kilpatrick v. Johnson, 15 N. Y. 322; Cook v. Lowry, 95 N. Y. 103; Barbour v. DeForest, 95 N. Y. 13, 15; Gilman v. Reddington, 24 N. Y. 9, 19; McGrath v. Van Stavoren, 8 Daly, 454. As to cases where the property is partly real and partly personal, with one common scheme of suspension, see Savage v. Burnham, 17 N. Y. 561, 570; Manice v. Manice, 43 N. Y. 303, 381 *et seq.*; Stringer v. Young, 191 N. Y. 157, 162.

⁴ Hoskin v. Long Island Loan & Trust Co., 139 App. Div. 258, and compare the cases cited *supra*, § 63, under the former statutes, relating to the destruction of a trust through merger.

If, as is here assumed, the right to revoke, on consent, is to be strictly confined, as in the terms of the statute, to the creator of the trust personally, the law as it stood before this addition was made, still applies to testamentary trusts, and also (after the death of the creator of the trust) to trusts originally created during his life, and still continuing in force after his death. The various general references in this chapter to the indestructible character of certain trusts in personal property, are to be understood to be subject to such qualification as may be effected by the provisions of the statute above quoted.

§ 400. Neither the trustee nor the beneficiary, in trusts affected by the statutes referred to in § 282, can effectuate an absolute transfer of title and end the trust. As already seen, the beneficiary cannot be empowered to do so even by an express provision in the instrument creating the trust; but as to the trustee the case is different, for it is only such of his acts as are in contravention of the trust that are forbidden, and he may, accordingly, by an express provision to that effect, be duly authorized, at any time in his discretion, to sell the property, distribute the proceeds, and end the trust. And it now remains to consider whether such a power to sell and distribute obviates a suspension of absolute ownership which would otherwise exist. If it does not, the term of such a trust must still, in spite of the power, be restricted within the statutory period; but if it does, then the term of the trust need not be thus restricted. We will, in discussing this question, assume an illustrative case of a trust to receive and apply income, to continue until the trustee shall decide at any time within five years, to sell the property, and distribute the proceeds as provided in the instrument. If there the absolute ownership is sus-

pended at all, the term is evidently illegal, because not measured by two lives in being.

§ 401. It might appear, at first sight, that a solution of the difficulty could be found in the mere meaning of the word "absolute." It is the "absolute ownership" that must not be suspended, and, literally understood, this requirement would render illegal, beyond two lives, any qualification whatever upon the ownership. It was suggested, for example, in *Converse v. Kellogg*,¹ that mere postponement of possession is inconsistent with absolute ownership, even though all interests are alienable and vested. But this view has not received the support of the later authorities. Mere postponement of possession does not operate to suspend absolute ownership,² and "whatever was said in *Converse v. Kellogg*, (7 Barb. 596), which warrants an inference that such deferring of payment amounts to a suspension of the absolute ownership, has no sanction in the decisions of this court."³ Thus upon the question now under consideration, no argument can be based on the theory that the term "absolute" must be understood literally.⁴

§ 402. Leaving that theory, therefore, the argument might next proceed to the proposition that the power of sale now in question cannot obviate the suspension of absolute ownership because, although the trustee can sell and distribute whenever he chooses, yet in fact he may not choose to do so until the five year term has expired, and thus the suspension may continue for five

¹ 7 Barb. 590.

² § 126.

³ *Bliven v. Seymour*, 88 N. Y. 469, 478; *Steinway v. Steinway*, 163 N. Y. 183, 195; *Warner v. Durant*, 76 N. Y. 133.

⁴ See also *Wells v. Squires*, 117 App. Div. 502, aff'd 191 N. Y. 529; *Williams v. Montgomery*, 148 N. Y. 519; *Brown v. The Mutual Trust Co.*, 22 Weekly Digest, 395.

years; and that the mere possibility of a suspension thus unduly measured is sufficient to condemn the scheme as illegal. This line of argument would be entirely correct if confined to cases of actual suspension of absolute ownership. *If* such a suspension might possibly continue for a term not limited to two lives in being, the provision which causes it is certainly void. But the question we are now considering is whether, in our assumed case, there is any suspension at all of the absolute ownership, and on that point the argument just stated throws no light. It only brings us back to the inquiry whether the term absolute ownership does involve anything more than vesting and alienability.

§ 403. Under these circumstances we naturally turn to the law relating to real property for aid. There we find (apart from trusts for charity) only four authorized classes of express trusts, all of which necessarily involve title in the trustee,¹ but only two of which interfere with alienability, and therefore only those two need be restricted, as to their term, within any statutory period.

§ 404. Thus it at once appears that there are such things, in real property, as express trusts, vesting title in the trustee, and yet occasioning no suspension of the absolute power of alienation. In such cases, all titles and interests being alienable and vested, the scheme is valid, even though it may continue for a period not measured by lives. Corresponding trusts in personal property naturally operate in the same manner, after title has once vested in the trustee. In fact, whether there is any express trust or not, the legal title to all

¹ Chapter IV: *Gilman v. Reddington*, 24 N. Y. 9, 15; *Matter of Straut*, 126 N. Y. 201; *Bergmann v. Lord*, 194 N. Y. 70, 76; *Cochrane v. Schell*, 140 N. Y. 516, 534; *Lockman v. Reilly*, 95 N. Y. 64.

the personal property of a testator vests in the first instance in the executor, as trustee for the creditors, legatees and, in the absence of specific disposition, those entitled by law to the property.¹ The executor has the legal title, but no contingency and no inalienability, and so no suspension of absolute ownership, results, and no "statutory period" based on lives need be specified.²

§ 405. In the case we are now examining, the power to sell and distribute is expressly conferred. In real property, such a disposition may satisfy both the Rules under consideration, Rule II, Vesting, because the trust estate itself is vested, and in no way prevents the vesting of any future interest, in the property or the proceeds, and Rule I, Alienability, because of the continuing power to sell and distribute. Under such circumstances the term of the trust need not be confined within the "statutory period."³ Now in the absence of any controlling reason to the contrary, the laws in relation to real property, in this field, must necessarily be applied, on the same state of facts, to personal property.⁴

§ 406. The only qualification of this general effect,

¹ *Blood v. Kane*, 130 N. Y. 514; *Lockman v. Reilly*, 95 N. Y. 64, 72; *Wager v. Wager*, 89 N. Y. 161; *Smith v. Edwards*, 88 N. Y. 92, 104; *Warner v. Durant*, 76 N. Y. 133, 136; *Steinway v. Steinway*, 163 N. Y. 183, 200; *Matter of Mullon*, 145 N. Y. 98, 104; *Greenland v. Waddell*, 116 N. Y. 234, 241; *Matter of Brandreth*, 169 N. Y. 437, 441-2; *Clark v. Cammann*, 160 N. Y. 315; *Peoples' Trust Co. v. Flynn*, 188 N. Y. 385; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108. See also *Cabble v. Cabble*, 111 App. Div. 426; *Matter of Maccaffil*, 127 App. Div. 21; *Porter v. Baldwin*, 139 App. Div. 278.

² *Steinway v. Steinway*, 163 N. Y. 183; *Robert v. Corning*, 89 N. Y. 225, 241.

³ *Supra*, §§ 42 *et seq.*

⁴ *Pers. Prop. L.*, § 11; *Williams v. Montgomery*, 148 N. Y. 519, 526; *supra*, § 385.

upon the existence of suspension, of a continuing power to sell and distribute, also applies to both classes of property, and in stating it we come now to the leading principle upon the subject now under discussion. For whether or not a given power to sell and distribute operates to obviate a suspension otherwise existing, depends only on whether or not the power itself is valid; and whether the power is valid or void, depends on the legality or the illegality of its purpose, and the end it is intended to effect. "The validity of these testamentary dispositions is to be determined by the question of the legality of the ultimate disposition of the corpus of the estate for which the power of sale or distribution is given."¹ "The statute of perpetuities is pointed only to the *power of alienation*, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason that the trustees are persons in being, who can, at any time, convey an absolute fee in possession. The only question which, in such a case, can arise under the statute of perpetuities, is, whether the trusts in respect to the converted fund, are legal or operate to suspend the absolute ownership of the fund, beyond the period allowed by law."²

§ 407. Thus the mere existence of an express trust of personal property does not necessarily involve any

¹ *Stoiber v. Stoiber*, 40 App. Div. 156, 161; *Whitefield v. Crissman*, 123 App. Div. 233, 235; *Garvey v. McDevitt*, 72 N. Y. 556, 564; *Henderson v. Henderson*, 113 N. Y. 1; *Hope v. Brewer*, 136 N. Y. 126, 135; *Matter of Wilkin*, 183 N. Y. 104; *Marvin v. Smith*, 46 N. Y. 571.

² *Robert v. Corning*, 89 N. Y. 225, 236.

suspension of alienability, or any postponement of vesting; and as these are the only topics covered by Rules I and II in relation to real property, and as there is no reason for reading into Rule III, in relation to personal property, any requirement in addition to those found in Rules I and II, and on the contrary it is to be assumed that the same principles apply, we must, it appears, understand that "absolute ownership" comprises only alienability and vesting, and that if those elements are present, the existence of an express trust is not inconsistent with "absolute ownership."¹

§ 408. It is true that the existence of an express trust is often referred to as suspending absolute ownership, and so it does if it causes inalienability. The fact that there was no trust to interfere with absolute ownership is thus, for example, referred to in *Steinway v. Steinway*,² and *Bliven v. Seymour*.³ But there the trust, if there had been one, would necessarily have caused suspension because there was no power at all to sell and distribute pending the term. It was on this account that that question was there involved. And so it is expressly stated in *Williams v. Montgomery*,⁴ *Smith v. Edwards*,⁵ and *Robert v. Corning*.⁶ If, then, where there is present such a power, a suspension does still exist, it is due to some other cause arising out of the future disposition of the proceeds of the sale.⁷

§ 409. All this is very clearly illustrated by the two cases of *Robert v. Corning*,⁸ and *Underwood v. Curtis*.⁹

¹ *Metcalfe v. Union Trust Co.*, 181 N. Y. 39, 44.

² 163 N. Y. 183, 197.

³ 88 N. Y. 469, 478.

⁴ 148 N. Y. 519, 525.

⁵ 88 N. Y. 92.

⁶ 89 N. Y. 225, 236.

⁷ *Matter of Wilcox*, 194 N. Y. 288, 305-6; *Stoiber v. Stoiber*, 40 App. Div. 156.

⁸ 89 N. Y. 225.

⁹ 127 N. Y. 523.

In both, there was a power of sale and distribution, the exercise of which was required only by the end of a term of years, but was authorized at any time during that term; in both, the power was such as to effect an equitable conversion of the property into personalty as of the time of the testator's death; and in both the expressed purpose of authorizing a delay in the actual sale and distribution was to prevent an unnecessary sacrifice of the property. Both cases, also, show the feature, pending the actual sale and distribution, of an express trust to receive and apply the income; for in the Underwood case such an express trust was specifically constituted, and in the Robert case, while it is not actually held that there was a precedent trust estate, the court did say,¹ that "The presence of the legal estate in the trustees pending the sale, if not absolutely necessary to enable them to perform the duty imposed upon them, to divide the net income and profits, is a convenient and natural arrangement, and the vesting of the legal title in the trustees by implication, would not, as we construe the will, defeat or disturb any of its provisions, but would be in harmony with its scheme and dispositions," and that² "it is unnecessary to determine whether the executors took under the will in question, the legal title to the real estate, for in the view we take of the will, there was no suspension of the power of alienation, whether the executors took a trust estate, or were simply donees of a trust power."³ For our present purpose, therefore, we may regard both cases as exactly alike in all the respects already mentioned. And yet in the Robert case the scheme was held valid, and in the Underwood case it was held void; and the difference in the results is to be found in one

¹ Page 237.

² Page 238.

³ Robert v. Corning, 89 N. Y. 225, 238.

difference, yet to be noticed, in the facts, which is the very same difference that would have produced the same divergent results in the case of real property.

§ 410. For in *Robert v. Corning* (subject only to the assumed precedent trust, and the power, and to a devolution of interest in given shares which must, if ever, take place as to each share within one life in being and therefore introduced no complication), the interests of the distributees were absolutely and beneficially vested at testator's death in persons in being, and the existence, as assumed by the court for purposes of argument, of the express trust coupled with the discretionary authority to postpone, for a period not measured by lives, the actual sale and distribution, was held not to suspend the "absolute ownership." In *Underwood v. Curtis*, on the other hand, two of the distributees were to take upon further express trusts each covering one quarter of the entire fund. These latter trusts would in themselves effect a suspension each for a term which, though bounded by a life, could not begin until the power of sale and distribution was in fact exercised. Upon that ground, the court found these final trusts void. As they must certainly cease, as to each share, by the end of two lives, the reasoning of the court on that particular feature, does appear out of line with all other decisions¹; but the point here is, that taking that finding as a starting point, the conclusion of the court necessarily follows, that the power to sell, being thus merely a power to effectuate void trusts, was itself void, and so could not operate to obviate the suspension otherwise occasioned by the intermediate trust. It is the existence of these future and illegal trusts, the 'assumed illegality of which involved the invalidity of the entire scheme, that constitutes the

¹ §§ 97, 98, *Supra*.

sole material distinction between that case and *Robert v. Corning*. No other ground can be found for the difference in the resulting decisions of the court.¹ And so we are brought back to the test set up in *Robert v. Corning*,² according to which in cases of the class under discussion, suspension of "absolute ownership" depends on whether the disposition to be effected under the power is valid or void.³

§ 411. As the reason for this distinction is found in the legality, in the one case, and the illegality in the other, of the purpose of the power, it follows that it is not confined to cases where the future disposition is illegal because it is a trust that causes the undue suspension. An undue suspension occasioned by a contingency would have the same effect upon the validity of the power, and so in turn upon the precedent trust estate. Nor is the question just discussed confined to cases where the power is one to sell and distribute. Any power under which an absolute title could be conveyed, and the trust or contingency extinguished, would have the same effect.⁴

¹ *Whitefield v. Crissman*, 123 App. Div. 233; *Wells v. Squires*, 117 App. Div. 502, aff'd 191 N. Y. 529; *Matter of Wilkin*, 183 N. Y. 104; *Keyser v. Mead*, 53 Misc. 114; *Roosevelt v. Roosevelt*, 6 Hun, 31, aff'd 64 N. Y. 651; *Matter of Straut*, 126 N. Y. 201; *Hope v. Brewer*, 136 N. Y. 126, 135; *Deegan v. Wade*, 144 N. Y. 573, 576; *Chanler v. New York Elevated R. R. Co.*, 34 App. Div. 305; *Stoiber v. Stoiber*, 40 App. Div. 156; *Hagemeyer v. Saulpaugh*, 97 App. Div. 535, 544; *Henderson v. Henderson*, 113 N. Y. 1; *Trowbridge v. Metcalf*, 5 App. Div. 318, aff'd 158 N. Y. 682; *Matter of Brown*, 154 N. Y. 313, 324; *Stewart v. Woolley*, 121 App. Div. 531.

² 89 N. Y. 225, 236.

³ *Matter of Ackermann*, 36 Misc. 752, 74 N. Y. Supp. 477, is apparently not thus explainable.

⁴ Illustrations of the principles which determine the character, as vested or contingent, of future estates which are to be conveyed by the trustee at the end of a precedent trust term, are cited above, Chap. IV.

Suspension by Powers.

§ 412. "Powers, as they existed by law on the thirty-first day of December, eighteen hundred and twenty-nine, are abolished. Hereafter the creation, construction and execution of powers, affecting real property, shall be subject to the provisions of this article," concerning Powers.¹ This statutory provision includes all powers (except certain powers of attorney there specified) both as to real and personal property, and "by analogy, the rules for the creation, construction and execution of powers as to real estate should be applied, so far as they can be, to personal estate."²

The Statutory Period.

§ 413. In the case of personal property this is in all cases two lives in being at the creation of the interest in question,³ without exception save that chattels real are affected by the Rule relating to real property.⁴

¹ Real Prop. L., § 130.

² Hutton v. Benkard, 92 N. Y. 295; Real Prop. L., § 130; Matter of Cooksey, 182 N. Y. 92; Cutting v. Cutting, 86 N. Y. 522; Fargo v. Squiers, 154 N. Y. 250, 258; Mills v. Husson, 140 N. Y. 99; Cook v. Lowry, 95 N. Y. 103, 111; Matter of Brown, 154 N. Y. 313, 324; Matter of Moehring, 154 N. Y. 423.

³ *Supra*, § 371. In the case of suspension occasioned by an instrument in execution of a power, the period of two lives is, as in the case of real property, computed from the time of the creation of the power, § 412.

⁴ *Supra*, § 371.

CHAPTER VIII.

GIFTS FOR CHARITY.

PRIOR TO LAWS 1893, CHAPTER 701.

SINCE LAWS 1893, CHAPTER 701.

Prior to Laws 1893, Chapter 701.

§ 414. By the Revised Statutes, 1 R. S. 727, § 45, Real Prop. L., § 91, express trusts concerning real property, except the four classes authorized by 1 R. S. 728, § 55, Real Prop. L., § 96, were abolished. Among others not thus authorized were trusts, as such, for charitable and religious purposes.¹ It was established that the former English law of charitable uses was not in force in New York.² It had frequently been held, also, that the statutory abolition of all trusts, except the four specified classes, did not apply to personal property trusts, so that charitable trusts of personal property were not abolished, though their term was restricted to two lives in being.³

§ 415. But present gifts, not to a trustee, but directly to a corporation organized for religious, educational,

¹ Holmes v. Mead, 52 N. Y. 332, 339; Bascom v. Albertson, 34 N. Y. 584, 615; Levy v. Levy, 33 N. Y. 97, 134; Downing v. Marshall, 23 N. Y. 366; Riker v. Leo, 115 N. Y. 93, 102; Cottman v. Grace, 112 N. Y. 299, 306-7; Beecher v. Yale, 45 N. Y. Supp. 622; Wilson v. Lynt, 30 Barb. 124.

² Cottman v. Grace, 112 N. Y. 299, 306-7; Holmes v. Mead, 52 N. Y. 332; Holland v. Alcock, 108 N. Y. 312, 336; Bascom v. Albertson, 34 N. Y. 584. The doctrine of *cy pres* then had no place in our law. Beekman v. Bonsor, 23 N. Y. 298, 310; Levy v. Levy, 33 N. Y. 97, 138; Bascom v. Albertson, 34 N. Y. 584. See Will of Fuller, 75 Wis. 431, and Webster v. Morris, 66 Wis. 364, 391. Also Appendix, *infra*.

³ Holmes v. Mead, 52 N. Y. 332, 343; Levy v. Levy, 33 N. Y. 97, 133-4; Adams v. Perry, 43 N. Y. 487, 497; Fairchild v. Edson, 154 N. Y. 199.

charitable or benevolent uses, were supported on the theory that they did not constitute trusts at all, but were direct gifts to the corporation for its own peculiar purposes, and that therefore the title in the corporation did not in itself effect any suspension of the absolute power of alienation, or of absolute ownership.¹

§ 416. Under this view also a future gift for its own purposes to a corporation to be formed, was valid if the period within which it was to be formed and to become vested was limited to a term measured by the usual "statutory period"; but if this measure were omitted, and the gift were given merely to a corporation to be created, then the disposition was void.²

¹ *Holland v. Alcock*, 108 N. Y. 312, 336-7; *Bascom v. Albertson*, 34 N. Y. 584, 620; *Bird v. Merkle*, 144 N. Y. 544; *Matter of Griffin*, 167 N. Y. 71; *Matter of Durand*, 194 N. Y. 477, 487; *Wetmore v. Parker*, 52 N. Y. 450; *Robert v. Corning*, 89 N. Y. 225, 241; *Matter of First Presb. Soc.*, 106 N. Y. 251; *Riker v. Leo*, 115 N. Y. 93, 102. And one charitable corporation might in some cases hold for the benefit of another. *Chamberlain v. Chamberlain*, 43 N. Y. 424, 435. See *Dodge v. Williams*, 46 Wis. 70; *Matter of Griffin*, 167 N. Y. 71.

As to the power of a corporation to take by grant, devise and bequest, *Sherwood v. Am. Bible Soc'y*, 4 Abb. Ct. App. Dec. 227; *Downing v. Marshall*, 23 N. Y. 366, 383. Foreign corporation; foreign community; state or nation. In *Matter of Huss*, 126 N. Y. 537, s. c. 44 Alb. L. J. 108; *Matter of Fox*, 52 N. Y. 530.

² *People v. Simonson*, 126 N. Y. 299; *Lougheed v. D. B. Church*, 129 N. Y. 211; *Booth v. Baptist Church*, 126 N. Y. 215; *Tilden v. Green*, 130 N. Y. 29, 47; *Read v. Williams*, 125 N. Y. 560, 569, 570; *St. John v. Andrews Institute*, 191 N. Y. 254, 267; *Riker v. North American Relief Soc'y*, 133 N. Y. 519; *Downing v. Marshall*, 23 N. Y. 366; *Bascom v. Albertson*, 34 N. Y. 584, 615; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108; *Phelps' Ex'r v. Pond*, 23 N. Y. 69, 77; *Adams v. Perry*, 43 N. Y. 487, 498; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337; *Cottman v. Grace*, 112 N. Y. 299, 306; *Burrill v. Boardman*, 43 N. Y. 254; *Shipman v. Rollins*, 98 N. Y. 311; *Sherwood v. Am. Bible Society*, 4 Abb. Ct. App. Dec. 227; *Marx v. McGlynn*, 88 N. Y. 357, 376; *Levy v. Levy*, 33 N. Y. 97, 134; *White v. Howard*, 46 N. Y. 144, 163; *Owens v. Missionary Society*, 14 N. Y. 380; *Manice v. Manice*, 43 N. Y. 303, 314, 387; *Jessup v. Pringle Memorial Home*, 27 Misc. 427; 47 App. Div. 622.

The Legislature might, of course, create exceptions to its general system,

§ 417. Instead of thus attempting an absolute gift to a corporation existing or to be formed, it was permissible to give real or personal property in trust, during the statutory period, for any of the purposes authorized, in the case of real property, by 1 R. S. 728, § 55, or, in the case of personal property, for any purpose whatever, if not unlawful; but all such trusts, in order to be valid, must be free from indefiniteness or uncertainty in respect to the beneficiaries.¹

Since Laws 1893, Chapter 701.

§ 418. The present statute however, L. 1893, Chap. 701, as amended, removes some of the difficulties which formerly prevented the carrying out of attempted trusts for charitable and similar purposes; for by Real Prop. L., § 113, it is provided that:

“ 1. No gift, grant, or devise to religious, educational, charitable or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries

for example L. 1890, Ch. 77; R. L. Ch. 60, sec. 4 (1813); *Church of Redemption v. Grace Church*, 68 N. Y. 570, 583; *Foote v. Bryant*, 47 N. Y. 544; *Reformed P. D. Church v. Brown*, 4 Abb. Ct. App. Dec. 31; L. 1839, Ch. 174; *White v. Miller*, 71 N. Y. 118. For a review of the English law, and of the changes that later took place under our statutes, see *Holland v. Alcock*, 108 N. Y. 312; *Bascom v. Albertson*, 34 N. Y. 584, 600; *Ayres v. Trustees of the M. E. Church*, 3 Sandf. 351; *Yates v. Yates*, 9 Barb. 324, 338, 339, 341; *Fountain v. Ravenel*, 17 How. (U. S.) 369; *Levy v. Levy*, 33 N. Y. 97, 132; *Matter of McGraw*, 111 N. Y. 66; *Williams v. Williams*, 8 N. Y. 525; *Allen v. Stevens*, 161 N. Y. 122; *Matter of Griffin*, 167 N. Y. 71, and other cases cited below.

¹ *Allen v. Stevens*, 161 N. Y. 122; *Read v. Williams*, 125 N. Y. 560; *People v. Powers*, 147 N. Y. 104; *Amherst College v. Ritch*, 151 N. Y. 282, 330; *Morton v. Woodbury*, 153 N. Y. 243; *Fairchild v. Edson*, 154 N. Y. 199; *Matter of Ingersoll*, 131 N. Y. 573; *Smith v. Chesebrough*, 176 N. Y. 317; *Riker v. Leo*, 115 N. Y. 93; and *Riker v. North American Relief Soc'y*, 133 N. Y. 519.

thereunder in the instrument creating the same. If in the instrument creating such a gift, grant or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, or devised for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court.

“2. The supreme court shall have control over gifts, grants and devises in all cases provided for by subdivision one of this section, and whenever it shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant or devise to religious, educational, charitable or benevolent uses as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, grant or devise shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation or direction contained therein; provided, however, that no such order shall be made without the consent of the donor or grantor of the property, if he be living.

“3. The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the courts.”¹

§ 419. By these statutes the Legislative intended to

¹ See also Real Prop. L., § 114, relating to “certain educational and other charitable uses authorized,” and § 114 *a*, cemetery trusts, etc., and § 115 “Certain grants for charitable uses regulated.” For similar pro-

restore the law of charitable trusts as declared in *Williams v. Williams*,¹ including the principles of the law governing the administration of such trusts. Under the provisions of the acts, a donor may name a competent corporation as trustee;² or provide that a competent corporation to be founded shall, when formed, act as trustee; or the trustee named may be an individual; but in so far as he does not thus make adequate provision for the vesting of title in trust, the statutes provide in effect that the trust shall not fail, but the title to the property given, granted, devised, or bequeathed in trust shall vest in the Supreme Court. In order that there should be a "trustee named," it is not now necessary that the instrument should state in express terms that the persons named should take as trustees, but it is enough that such an intent be clearly indicated.³ In order that a trust under the present statutes may be "in other respects valid," it must not violate the statute concerning accumulations;⁴ and must not be so indefinite in regard to what its purposes are as

visions as to personal property, see Pers. Prop. L., §§ 12, 13, 13a, 14. Mr. Fowler in his *Real Property Law*, 3rd Ed., pp. 539, 564, gives the text of the various statutes on these subjects, beginning with that of 1893. These statutes cannot have any retroactive effect, to change rights in property which had already vested; *People v. Powers*, 147 N. Y. 104, 109; *Murray v. Miller*, 178 N. Y. 316. But in other respects they may sometimes have a bearing on gifts previously provided for. *Dammert v. Osborn*, 140 N. Y. 30, 43.

¹ 8 N. Y. 525.

² See *Matter of Griffin*, 167 N. Y. 71, 81.

³ *Rothschild v. Schiff*, 188 N. Y. 327, 331. See *Manley v. Fiske*, 139 App. Div. 665; 201 N. Y. 546. It seems that the present *cy pres* statute applies to powers in trust as well as to express trusts. *Cullen, J.*, in *Kelly v. Hovey*, 35 App. Div. 273, 277; *Real Prop. L.*, § 182. As to its effect on a gift in trust by a New York testator to a foreign unincorporated college, see *Catt v. Catt*, 118 App. Div. 742. And on the general subject of the conflict of laws, see Chapter XII.

⁴ *St. John v. Andrews Institute*, 191 N. Y. 254, 277; see also *Smith v. Chesebrough*, 176 N. Y. 317.

to result in invalidity under established principles. Thus the statute does not validate indefinite gifts in trust for private purposes, and accordingly a trust merely for "educational institutions," which thus does not prescribe that they must be of a public character, is invalid.¹ But the requirement of the statute that it shall be "in other respects valid," does not make it necessary to restrict a trust for charity within the "statutory period" to which other trusts are limited. It may be perpetual.² But nevertheless, the words quoted from the statute have a relation to the subject of suspension of the power of alienation, in that, for example, a gift for charity might fail on account of its intimate connection, in the scheme of the instrument, with other provisions rendered void by failure to comply with the statutes relative to suspension.³ And though property may be given in perpetuity for charitable purposes, yet the fact that an ultimate limitation is thus for charity does not validate a prior non-charitable trust which would otherwise be void on account of suspending alienability for a period not duly restricted.⁴

§ 420. In addition to the trusts now rendered valid by the statute, the established theory that property may be granted, devised or bequeathed to a charitable corporation for its own corporate purposes, if it is then in existence or is to be formed within two designated "lives in being" still holds good. Such a gift does not constitute a trust at all.⁵

¹ *Matter of Shattuck*, 193 N. Y. 446; compare *Bowman v. Domestic & Foreign M. Soc.*, 100 App. Div. 29, modified 182 N. Y. 494; *Kingsbury v. Brandegee*, 113 App. Div. 606.

² *Allen v. Stevens*, 161 N. Y. 122, 143-5; *Bowman v. Domestic & Foreign M. Soc.*, 182 N. Y. 494; *Matter of Griffin*, 167 N. Y. 71.

³ *Allen v. Stevens*, 161 N. Y. 122, 145.

⁴ *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 495.

⁵ *St. John v. Andrews Institute*, 191 N. Y. 254, 267; *Matter of Griffin*, 167 N. Y. 71, 83; *Bird v. Merkle*, 144 N. Y. 544; *Johnston v. Hughes*,

187 N. Y. 446; Boardman v. Hitchcock, 136 App. Div. 253, aff'd 202 N. Y. (Mem.).

As to devises or bequests, absolute or in trust, under the former or the present law, to voluntary unincorporated associations, see *Murray v. Miller*, 178 N. Y. 316; *Fralick v. Lyford*, 107 App. Div. 543, aff'd 187 N. Y. 524; *Fairchild v. Edson*, 154 N. Y. 199; *Matter of Graves*, 171 N. Y. 40, 47; *Mount v. Tuttle*, 183 N. Y. 358, 366-7; *Sherwood v. Am. Bible Society*, 4 Abb. Ct. App. Dec. 227; *White v. Howard*, 46 N. Y. 144, 163.

The subject of provisions, whether by way of charitable use or otherwise, relating to tombs, cemetery lots, etc., has been dealt with from time to time in very numerous statutes, *e. g.* County L., § 152; Religious Corporations L., § 7; Real Prop. L. § 114, subd. 3; *id.* § 114a; Pers. Prop. L. § 13a; *Driscoll v. Hewlett*, 198 N. Y. 297; *Matter of Dewitt*, 113 App. Div. 790, aff'd 188 N. Y. 567; *Read v. Williams*, 125 N. Y. 560; *Matter of Murray*, 34 Misc. 39; *Matter of Waldron*, 57 Misc. 275; *Matter of Schuler*, 24 N. Y. Supp. 847; *Pfaler v. Raberg*, 3 Dem. 360; *Matter of Perkins*, 68 Misc. 255. Section 114a of the Real Property Law includes a provision that gifts, grants and devises there authorized shall not "be deemed invalid as violating any existing laws against perpetuities or suspension of the power of alienation of title to property." See also, on this point, Pers. Prop. L. § 13a.

Limitation on amount of devise or bequest, in certain cases, to charitable uses. Decedent Estate L., § 17 (§§ 18-20 repealed, see L. 1911, Ch. 857). *Wetmore v. Parker*, 52 N. Y. 450, 460; *Smith v. Havens Relief Fund*, 118 App. Div. 678, aff'd 190 N. Y. 557; *Chamberlain v. Chamberlain*, 43 N. Y. 424, 440; *Amherst College v. Ritch*, 151 N. Y. 282, 331; *Fairchild v. Edson*, 154 N. Y. 199; *Matter of Walker*, 136 N. Y. 20; *St. John v. Andrews Institute*, 191 N. Y. 254, 272-6; *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 491, 494; *Jones v. Kelly*, 170 N. Y. 401; *Allen v. Stevens*, 161 N. Y. 122; *Matter of Durand*, 194 N. Y. 477, 488; *Matter of Cooney*, 112 App. Div. 659, 115 App. Div. 895, aff'd 187 N. Y. 546; *Moser v. Talman*, 114 App. Div. 850; *Farmers' Loan & Trust Co. v. Shaw*, 127 App. Div. 656, 662; *Hollis v. Drew Theo. Seminary*, 95 N. Y. 166, 177; *Harris v. Am. Bible Soc'y*, 2 Abb. Ct. App. Dec. 316, 323; *Matter of Strang*, 121 App. Div. 112; *Matter of Teed*, 59 Hun, 63.

When such gifts were void if made within two months before death. Former Decedent Estate Law, §§ 18, 19, now repealed by L. 1911, Ch. 857; *Matter of Lampson*, 161 N. Y. 511; *Fairchild v. Edson*, 154 N. Y. 199; *Pearson v. Collins*, 113 App. Div. 657, app. dismissed 187 N. Y. 530; *Marx v. McGlynn*, 88 N. Y. 357, 376; *Stephenson v. Short*, 92 N. Y. 433, 445; *LeFevre v. LeFevre*, 59 N. Y. 434; *Kerr v. Dougherty*, 79 N. Y. 327; *Beekman v. Peo.*, 27 Barb. 260; *Hollis v. Drew Theo. Seminary*, 95 N. Y. 166, 170. This affects only the corporations chartered under the statute containing the restriction, or those whose charters refer to it and make its provisions applicable. *Stephenson v. Short*, 92 N. Y. 433; *Kerr v. Dougherty*, 79 N. Y. 327, 335, 339; *Lefevre v. Lefevre*, 59 N. Y. 434, 448, and other cases last above cited; *Smith v. Havens Relief Fund*, 118 App. Div. 678, aff'd 190 N. Y. 557.

CHAPTER IX.

EQUITABLE CONVERSION.

§ 421. As already stated, there are certain respects in which the principles concerning alienability, and vesting, differ in form, or in application, according as the property in question is real or personal. Some of the more important differences are, (1) that in the case of real property only, the "statutory period" of two lives is subject, in certain exceptional cases, to a further extension for one minority; (2) that there are only four purposes (or, including charities, five purposes) for which express trusts of real property, some of which involve suspension of alienability, can be created; while in the case of personal property, express trusts may be created for any purpose not in itself unlawful; (3) in case of conflict of laws, the principles applicable to real and personal property differ in many respects.

§ 422. In view of these differences, it is evident that the nature of the property concerning which a question of suspension, or postponement of vesting, is raised, may be of great importance.

§ 423. In determining whether a given scheme of disposition does deal with real or with personal property, the mere fact of the actual form it wears at the creation of the estate is not decisive. Where there is an imperative direction to convert real property into personal, or personal into real,¹ here equity, on the principle of regarding as done that which ought to be done,

¹ *Thorn v. Coles*, 3 Edw. Ch. 330.

considers the conversion as effected at the time provided for or contemplated by the instrument, even though the property is not then in fact converted. This is called "equitable conversion,"¹ and the rules relating respectively to suspension of the absolute power of alienation, and to postponement of vesting, as affecting real property, and to suspension of the absolute ownership of personal property, are applied accordingly.²

§ 424. Such a conversion is not effected by a mere discretionary power of sale;³ but in order to occasion equitable conversion, the direction to sell need not be given in express terms; it may be raised by implication.⁴

¹ *Doane v. Mercantile Trust Co.*, 160 N. Y. 494; *Matter of Caldwell*, 188 N. Y. 115; *Schlereth v. Schlereth*, 173 N. Y. 444, 449; *McDonald v. O'Hara*, 144 N. Y. 566; *Hope v. Brewer*, 136 N. Y. 126, 134; *Underwood v. Curtis*, 127 N. Y. 523; *Robert v. Corning*, 89 N. Y. 225, 239; *Hatch v. Bassett*, 52 N. Y. 359; *Cottman v. Grace*, 112 N. Y. 299, 305; *Hood v. Hood*, 85 N. Y. 561, 570; *Asche v. Asche*, 113 N. Y. 232; *Fisher v. Banta*, 66 N. Y. 468; *Moncrief v. Ross*, 50 N. Y. 431; *Greenland v. Waddell*, 116 N. Y. 234; *Savage v. Burnham*, 17 N. Y. 561, 569; *Vincent v. Newhouse*, 83 N. Y. 511; see *Coann v. Culver*, 188 N. Y. 9, 15.

² *Kane v. Gott*, 24 Wend. 641, 659; *Everitt v. Everitt*, 29 N. Y. 39, 71; *Wells v. Wells*, 88 N. Y. 323, 331; *Greenland v. Waddell*, 116 N. Y. 234; *Savage v. Burnham*, 17 N. Y. 561, 569; *Oggsbury v. Oggsbury*, 115 N. Y. 290; *Hope v. Brewer*, 136 N. Y. 126, 134; *Underwood v. Curtis*, 127 N. Y. 523, 535; *Matter of Wilcox*, 194 N. Y. 288.

³ *Coann v. Culver*, 188 N. Y. 9, 13, 15; *Matter of Tatum*, 169 N. Y. 514, 518; *Matter of Tienken*, 131 N. Y. 391, 408; *Matter of Coolidge*, 85 App. Div. 295, aff'd 177 N. Y. 541; *Matter of Bingham*, 127 N. Y. 426; *Wells v. Brooklyn Union Elevated Railroad Co.*, 121 App. Div. 491, aff'd 193 N. Y. 641; *Clift v. Moses*, 116 N. Y. 144, 158; *Matter of McComb*, 117 N. Y. 378; *Miller v. Wright*, 109 N. Y. 194; *Read v. Williams*, 125 N. Y. 560; *Lee v. Tower*, 124 N. Y. 370, 26 N. E. Rep. 943; *White v. Howard*, 46 N. Y. 144, 166-7; *Van Vechten v. Keator*, 63 N. Y. 52; *Harris v. Clark*, 7 N. Y. 242.

⁴ *Matter of Russell*, 168 N. Y. 169, 172; *Salisbury v. Slade*, 160 N. Y. 278; *Sweeney v. Warren*, 127 N. Y. 426, 432; *Asche v. Asche*, 113 N. Y. 232, 235; *Power v. Cassidy*, 79 N. Y. 602; *Lent v. Howard*, 89 N. Y. 16; *Tillman v. Davis*, 95 N. Y. 17, 23; see *Hobson v. Hale*, 95 N. Y.

And a permission to the trustee to fix the particular time of sale, or to delay the sale beyond the time designated, does not necessarily prevent an equitable conversion.¹ Where a conversion is directed for a particular purpose, and that purpose fails, the property retains its original character.² And under certain circumstances, considered in another place, the exercise of "election" to take the property in its unconverted form, may effect a "reconversion."³

§ 425. As distinguished from the class of cases where the validity of given provisions turns on the nature of the property affected, and thus may depend on the ap-

588; *Gourley v. Campbell*, 66 N. Y. 169, 172; *Fraser v. Trustees*, 124 N. Y. 479; *Miller v. Wright*, 109 N. Y. 194, 199; *Chamberlain v. Taylor*, 105 N. Y. 185, 194; *Clift v. Moses*, 116 N. Y. 144, 157 *et seq.*; *Scholle v. Scholle*, 113 N. Y. 261, 271; *Phelps' Ex'r. v. Pond*, 23 N. Y. 69; *Delafield v. Barlow*, 107 N. Y. 535.

¹ *Underwood v. Curtis*, 127 N. Y. 523, 535; *Fraser v. Trustees*, 124 N. Y. 479, 484; *Salisbury v. Slade*, 160 N. Y. 278, 289; *March v. March*, 186 N. Y. 99, 104; *Robert v. Corning*, 89 N. Y. 225, 239; *Greenland v. Waddell*, 116 N. Y. 234; *Fisher v. Banta*, 66 N. Y. 468; *Lent v. Howard*, 89 N. Y. 169, 177; *Matter of McGraw*, 111 N. Y. 66, 113; *Stagg v. Jackson*, 1 N. Y. 206, 212.

² *Jones v. Kelly*, 170 N. Y. 401; *Trask v. Sturges*, 170 N. Y. 482, 489; *Sweeney v. Warren*, 127 N. Y. 426, 431; *Matter of Tienken*, 131 N. Y. 391, 408; *Gourley v. Campbell*, 66 N. Y. 169, 174; *Chamberlain v. Taylor*, 105 N. Y. 185, 194; *Parker v. Linden*, 113 N. Y. 28; *Fisher v. Banta*, 66 N. Y. 468, 477; *Bogert v. Hertell*, 4 Hill, 492. See *Greenland v. Waddell*, 116 N. Y. 234, 245; *Wright v. Trustees*, *Hoffman Ch.* 202; *Hobson v. Hale*, 95 N. Y. 588, 606. As to the application of the doctrine of conversion to a surplus of the proceeds of sale not needed for the purpose for which sale was directed, see *Downing v. Marshall*, 1 Abb. Ct. App. Dec. 524, 543; *Van Vechten v. Keator*, 63 N. Y. 52; *Erwin v. Loper*, 43 N. Y. 521; *Parker v. Linden*, 113 N. Y. 28. Effect of a direction to sell, as against an afterborn child, *Smith v. Robertson*, 89 N. Y. 555.

³ *Hetzel v. Barber*, 69 N. Y. 1, 12; *Greenland v. Waddell*, 116 N. Y. 234, 246; *Armstrong v. McKelvey*, 104 N. Y. 179, 183-4; *Prentice v. Janssen*, 79 N. Y. 478, 484, *et seq.*; *Parker v. Linden*, 113 N. Y. 28, 38; *Trask v. Sturges*, 170 N. Y. 482; compare *McDonald v. O'Hara*, 144 N. Y. 566.

plicability of the doctrine of equitable conversion; there is another class of cases where, so far as concerns the question of validity, it is quite immaterial whether the property is viewed as equitably converted, or not. Such are all cases where the Rules in relation to alienability, and vesting, are the same, as applied both to real and to personal property. As the Rules are the same, the property subjected to them in its unconverted form, is necessarily likewise subject, even though equitably converted. Illustrations of this class may be found in the cases discussed in Chapter II, where even an imperative power to sell does not obviate an unlawful suspension otherwise existing, if the proceeds of the sale are still subject to an unlawful suspension of absolute ownership.

CHAPTER X.

SEPARABILITY.

GENERAL PRINCIPLES.

ALTERNATIVE FUTURE DISPOSITIONS.

Simple Alternative Contingencies.

Involved Alternative Contingencies.

Contingencies with an Alternative Application.

General Principles.

§ 426. Where an instrument contains dispositions some of which are void for undue suspension, or postponement of vesting, it does not necessarily follow that all parts of the scheme are thereby destroyed. For a distinction is to be observed between schemes which were obviously intended to constitute a single entity and must stand or fall on their merits as one whole, and those which may be separated into wholly independent dispositions. If a provision of the former character involves an unlawful suspension or postponement, the whole scheme falls to the ground,¹ while if

¹ Central Trust Co. v. Egleston, 185 N. Y. 23, 34; Schlereth v. Schlereth, 173 N. Y. 444; Hafner v. Hafner, 62 App. Div. 316, aff'd 171 N. Y. 633; Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86; Matter of Will of Butterfield, 133 N. Y. 473, 476; Martin v. Pine, 79 Hun, 426, 430; Matter of Dewitt, 113 App. Div. 790, aff'd 188 N. Y. 567; Brown v. Quintard, 177 N. Y. 75, 85; Simpson v. Trust Co. of America, 129 App. Div. 200, aff'd 197 N. Y. 586; Matter of Stevens, 161 N. Y. 122, 145; Amory v. Lord, 9 N. Y. 403, 413-18-19; Levy v. Levy, 33 N. Y. 97 (which compare with Adams v. Perry, 43 N. Y. 487); Haynes v. Sherman, 117 N. Y. 433; Knox v. Jones, 47 N. Y. 389, 398 *et seq.*; Harris v. Clark, 7 N. Y. 242; Dana v. Murray, 122 N. Y. 604; Holmes v. Mead, 52 N. Y. 332, 344; Woodruff v. Cook, 61

the taint of illegality attaches only to a wholly independent part of an entire scheme, this tainted part may be cut off, and the rest allowed to stand.¹

N. Y. 638, 641, *et seq.*; Jennings v. Jennings, 7 N. Y. 547; Clemens v. Clemens, 60 Barb. 366, aff'd 37 N. Y. 59; Tilden v. Greene, 130 N. Y. 29, 50; Colton v. Fox, 67 N. Y. 348, 352; Rice v. Barrett, 102 N. Y. 161; Field v. Field's Exr's, 4 Sandf. Ch. 528, 551; Walter v. Walter, 60 Misc. 383, aff'd 133 App. Div. 893, aff'd 197 N. Y. 606; Dresser v. Travis, 39 Misc. 358, 363, aff'd 87 App. Div. 632.

¹ Underwood v. Curtis, 127 N. Y. 523, 542; Brown v. Richter, 76 Hun, 469, aff'd 144 N. Y. 706; Smith v. Chesebrough, 176 N. Y. 317; Trunkey v. Van Sant, 176 N. Y. 535; Kalish v. Kalish, 166 N. Y. 368; Haug v. Schumacher, 166 N. Y. 506; Hascall v. King, 162 N. Y. 134, 152-3; Chastain v. Dickinson, 201 N. Y. 538; Maitland v. Baldwin, 70 Hun, 267; Martin v. Pine, 79 Hun 426; Matter of Mount, 185 N. Y. 162; Culross v. Gibbons, 130 N. Y. 447, 452; Schey v. Schey, 194 N. Y. 368; Matter of Wilcox, 194 N. Y. 288, 293; Morton Trust Co. v. Sands, 195 N. Y. 28; Matter of Jenkins, 132 App. Div. 339; Matter of Harteau, 125 App. Div. 710, 714, app. dism'd. 196 N. Y. 513; Cochrane v. Schell, 140 N. Y. 516, 536; Kennedy v. Hoy, 105 N. Y. 134; Kilpatrick v. Johnson, 15 N. Y. 322; Smith v. Edwards, 88 N. Y. 92, 104; Manice v. Manice, 43 N. Y. 303, 383; Harrison v. Harrison, 36 N. Y. 543; Tiers v. Tiers, 98 N. Y. 568, 573; Savage v. Burnham, 17 N. Y. 561, 572; Van Schuyver v. Mulford, 59 N. Y. 426; Henderson v. Henderson, 113 N. Y. 1, 15; Adams v. Perry, 43 N. Y. 487, 500 *et seq.* (which compare with Levy v. Levy, 33 N. Y. 97); Woodgate v. Fleet, 64 N. Y. 566, 573; Barker v. Crosby, 32 Barb. 184; Oxley v. Lane, 35 N. Y. 340, 349, *et seq.*; DePeyster v. Clendining, 8 Pal. 295, 26 Wend. 21; Purdy v. Hayt, 92 N. Y. 446, 458; Schettler v. Smith, 41 N. Y. 328, 335, *et seq.*; Grout v. Van Schoonhoven, 1 Sandf. Ch. 326, 340; Matter of Herrick, 32 N. Y. State Rep. 1032, 1036. The following cases may also be consulted: Darling v. Rogers, 22 Wend. 483; Arnold v. Gilbert, 5 Barb. 190; Dupré v. Thompson, 4 Barb. 279, 284; Shipman v. Rollins, 98 N. Y. 311, 330; Knox v. Jones, 47 N. Y. 389; James v. Beasley, 14 Hun, 520; Williams v. Conrad, 30 Barb., 524; Killam v. Allen, 52 Barb. 605; Bean v. Bowen, 47 How. Pr. 306, 328; Garland v. Garland, 35 Misc. 147; Matter of Buchner, 60 Misc. 287. The cases of Coster v. Lorillard, 14 Wend. 265; Hawley v. James, 16 Wend. 61, and Root v. Stuyvesant, 18 Wend. 257; are said in Kane v. Gott, 24 Wend. 641, 666, not to hold a contrary doctrine, though in them the rule was not liberally applied. See opinion of Cowen, J., in Darling v. Rogers, 22 Wend. 483. Such also appears to be the case in Matter of Bruchaeser, 49 Misc. 194. It seems to be suggested in Van Vechten v. Van Veghten, 8 Pal. 104, 128; Smith v. Edwards, 88 N. Y. 92, 104, that the nature of personal property is such as to

§ 427. The fact that valid and void limitations are both embraced within the terms of a single trust, does not constitute any insuperable obstacle in the way of sustaining the former while cutting off the latter.¹

§ 428. And where an estate is vested in a trustee upon several independent and separable trusts, some of which are legal, while others are in contravention of the statute concerning suspension, the estate of the trustee may, in accordance with the principles above stated, be

render various dispositions more readily severable than in the case of real property. See *Holmes v. Mead*, 52 N. Y. 332, 338.

It is possible that events occurring when or after the instrument goes into effect may, by rendering it ineffectual in part, have a bearing upon the feasibility of supporting provisions not directly affected. *Brown v. Quintard*, 177 N. Y. 75, 84-5; but see *Van Buren v. Dash*, 30 N. Y. 393, 426. For the possible bearing of an election by a widow to take her dower rights rather than interests under a testamentary trust created by her husband's will in lieu of dower, as affecting the status of the entire trust scheme, see generally, *Savage v. Burnham*, 17 N. Y. 561; *Tobias v. Ketchum*, 32 N. Y. 319, 327 (see *Konvalinka v. Schlegel*, 104 N. Y. 125, 130); *Matter of Frazer*, 92 N. Y. 250; *People's Trust Co. v. Flynn*, 113 App. Div. 683, 684, reversed 188 N. Y. 385; *Buchanan v. Little*, 154 N. Y. 147; *Matter of Gorden*, 172 N. Y. 25; *Horstmann v. Flege*, 172 N. Y. 381; *Matter of Zahrt*, 94 N. Y. 605; *Hooker v. Hooker*, 41 App. Div. 235, 166 N. Y. 156; *Gilman v. Gilman*, 111 N. Y. 265; *Bailey v. Bailey*, 97 N. Y. 460, 471; *Asche v. Asche*, 113 N. Y. 232; *Akin v. Kellogg*, 119 N. Y. 441; *Wilson v. Wilson*, 120 App. Div. 581; *Lee v. Tower*, 124 N. Y. 370; *Kirchner v. Kirchner*, 71 Misc. 57. Effect of birth of child after execution of will, *Decedent Estate Law*, §§ 26, 35; *Herriot v. Prime*, 155 N. Y. 5; *Tavshanjian v. Abbott*, 200 N. Y. 374. And where the invalidating of certain trusts and the sustaining of certain wholly independent devises, would be to give the devises (being also heirs) an undue and unintended share, and they must elect whether to take under the will or in hostility to it, *Persons v. Snook*, 40 Barb. 144, 157, their election might lead to the same result.

¹ *Harrison v. Harrison*, 36 N. Y. 543; *Manice v. Manice*, 43 N. Y. 303, 363, 383; *Savage v. Burnham*, 17 N. Y. 561, 576; *Post v. Hover*, 33 N. Y. 593; *Darling v. Rogers* (opinion of Cowen J.), 22 Wend. 483; *Dupré v. Thompson*, 4 Barb. 279, 284, aff'd. 8 Barb. 538; *Bolton v. Jacks*, 6 Robt. 166; *Kalish v. Kalish*, 166 N. Y. 368, 376.

upheld to the extent necessary to enable him to execute the valid trusts.¹

§ 429. But even where among several provisions some are in themselves valid, and others are invalid, the whole scheme may be vitiated even although the illegal provisions are distinct and easily separable from the others. This would be the case where the result of discarding the invalid and sustaining the valid would be to seriously interfere with the obvious general intention of the testator or grantor as applied to the main features of his plan.² For where the main elements of a general scheme fail, through invalidity, the subsidiary and dependent elements, even though *per se* valid, fail too.³

¹ Van Schuyver v. Mulford, 59 N. Y. 426, 432; Adams v. Perry, 43 N. Y. 487, 500; Savage v. Burnham, 17 N. Y. 561, 570 *et seq.*; Woodgate v. Fleet, 44 N. Y. 1; Brown v. Richter, 76 Hun, 469, *aff'd* 144 N. Y. 706. See also cases cited in preceding note.

The statutory provision Real Prop. L., § 99, that "where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees," does not mean that if a separable portion of the trust is invalid no estate shall vest in the trustees as to the other portions. Greene v. Greene, 125 N. Y. 506; Underwood v. Curtis, 127 N. Y. 523; Kalish v. Kalish, 166 N. Y. 368, 376.

For the effect, on the general scheme, of a provision for a future trust, invalid for undue suspension of the power of alienation and limited to take effect only upon a contingency which in fact did not occur, see Morton Trust Co. v. Sands, 195 N. Y. 28.

² Benedict v. Webb, 98 N. Y. 460, 466; Holmes v. Mead, 52 N. Y. 332, 344 *et seq.*; Clemens v. Clemens, 60 Barb. 366, *aff'd* 37 N. Y. 59; Chipman v. Montgomery, 63 N. Y. 221, 234.

³ Walsh v. Waldron, 63 Hun, 315, *aff'd* 135 N. Y. 650; Holmes v. Mead, 52 N. Y. 332, 344; Cowen v. Rinaldo, 82 Hun, 479; LaFarge v. Brown, 31 App. Div. 542; Harris v. Clark, 7 N. Y. 242; Allen v. Stevens, 161 N. Y. 122, 145. See Tilden v. Green, 130 N. Y. 29, 50.

In order to guard against the possible effect of invalidity of certain portions, or features, of a will, the testator may validly provide rules to be followed in that event. Onderdonk v. Onderdonk, 127 N. Y. 196; McComb v. Title Guarantee & Trust Co., 36 Misc. 370, *aff'd* 70 App. Div. 618.

Alternative Future Dispositions.

§ 430. Where the instrument provides for a future disposition of property, by making alternative limitations, one or the other of which is to take effect according to the happening of specified alternative contingencies, the mere fact that the limitation over upon one contingency is invalid because it might involve undue suspension, or postponement of vesting, does not invalidate the other limitation which, if the contingency upon which it would become operative should occur, could not possibly occasion such undue suspension or postponement. Illustrations of various schemes of alternative dispositions are given in the following sections.

§ 431. It is to be noticed that such schemes may suggest at first sight, an apparent exception or qualification to the rule already stated, that the absence of undue suspension must not be made to depend on subsequent events; for in the cases under consideration the going into effect of such one of the alternative estates as is in itself valid, is dependent upon the happening of certain future events. The validity of such dispositions does not, however, in reality rest upon an exception to the general rule, as clearly appears from the following statement of the rule itself, to be found in the opinion in *Fowler v. Depau*.¹ "The rule is, that if on a particular contingency the power of alienation is so suspended that it may possibly exceed the limits prescribed by law, the estate granted on that particular contingency is void; but this defect, which would affect the estate only if that contingency had occurred, can have no effect on it if that contingency does not occur; then that unlawful estate is not attempted. Accordingly, the good alternative estate is sustained, notwith-

¹ 26 Barb. 224.

standing the defect which would have been in the other, if the course of events had created it."

§ 432. In the one class of cases, the uncertainty affects the particular estate in question, which might involve undue suspension or postponement as the facts turn out, and is therefore invalid; in the other class of cases, the uncertainty is merely whether, as among two or more alternative dispositions, that one which could not possibly effect an illegal result, or that one which might do so, will be the one which the future events will bring into operation under the terms of the instrument, and this uncertainty does not in itself operate to invalidate the one which could not involve illegal results if it should thus become operative. "But for the prohibition of the statute, both dispositions would have been lawful and valid, and either would have taken effect according to the happening of the events giving it vitality. The statute comes in and avoids one of the dispositions, leaving the other unaffected by its provisions. Why should not the latter take effect upon the occurrence of the events upon which it was made to depend? The authorities sustain its validity."¹ And in such cases also, if the disposition of the precedent estate is so far separable as to be valid in any event, irrespective of which contingency may occur in future, then it may be sustained, and the determination of the validity of the future dispositions may be deferred, within the limits of the statutory period, until the events occur upon which the decision as to them must be based.²

¹ Schettler v. Smith, 41 N. Y. 328.

² Matter of Mount, 185 N. Y. 162; Matter of Hoffman, 201 N. Y. 247, 254; McComb v. Title Guarantee & Trust Co., 36 Misc. 370, aff'd 70 App. Div. 618; Mendel v. Levis, 40 Misc. 271; Tompkins v. Verplanck, 10 App. Div. 572; Young v. Barker, 141 App. Div. 801, 807; Clark v. Goodridge, 51 Misc. 140; Matter of Buchner, 60 Misc. 287, 290. The term "contingencies with a double aspect," has long

1. *Simple Alternative Contingencies.*

§ 433. Here the testator or grantor designates two or more alternative states of fact, one or the other of which may exist at some specified future time or on the happening of some future event, and then specifically provides an alternative future disposition of property for each respective state of facts. This method of disposition is covered, in one aspect, in so far as concerns alternative future estates, by the Real Property Law which provides that two or more future estates may be created, to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly.¹ In such schemes of disposition, if one of the limitations, when considered by itself, is unobjectionable, it may be sustained, to go into effect if the appropriate event shall occur, even though the alternative limitation, based upon the happening of some different event, must be suppressed because it might operate to cause an undue suspension or postponement.²

2. *Involved Alternative Contingencies.*

§ 434. The peculiar characteristics of the cases classified under this head may best be shown by illustrations. But a general description of the class may be given as follows:

been employed, apparently with some variation in the scope of its meaning, to represent some, or all, of the classes of cases considered in the following sections. Lewis, *Perpetuities*, Chapter XXI; Notes of the original N. Y. Revisers; Humphreys on Real Property, 286.

¹ Real Prop. L., § 51. *Wilson v. White*, 109 N. Y. 59, 61.

² *Kiah v. Grenier*, 56 N. Y. 220, 225 (1 T. & C. 388, which see); *DeKay v. Irving*, 5 Den. 646, 654; *Schettler v. Smith*, 41 N. Y. 328; see *Kelso v. Lorillard*, 85 N. Y. 177, 182; *Genet v. Hunt*, 113 N. Y. 158; *Marsden, Perpetuities*, 74; *Matter of Wilcox*, 194 N. Y. 288, 294; *Matter of Murray*, 75 App. Div. 246. For a valuable discussion of alternative contingencies, see *Fowler v. Depau*, 26 Barb. 224.

§ 435. Where the contingency, upon the happening of which a future estate or interest is to become alienable, or vested, may turn out to be too remote under the rules concerning suspension or postponement, the future disposition is invalid. But in such cases it sometimes happens, from the nature of the particular circumstances, that there is another contingency which, if it happens at all, must happen within the statutory period, and must involve the simultaneous happening of the specified contingency. Sometimes the grantor or testator provides for this state of things in terms, and after directing that the future disposition shall take effect on the happening of the too remote contingency, goes on to provide that it shall also take effect in case of the happening of the other event which, if it happens at all, must happen in due time and must involve the simultaneous happening of that first specified.¹

§ 436. If the grantor or testator specifically makes these separate provisions, then there is no difficulty in allowing the gift to take effect in case of the happening of the event not too remote; although it could not be allowed to take effect otherwise, whenever the specified and possibly too remote event might happen. But where such a state of things exists and he does not make any specific provision for the valid contingency, the court will not "split the gift" for him, that is, they will not sustain the future limitation even in case of the happening of the valid but not specifically mentioned contingency.¹

§ 437. This class of cases is illustrated, and the principles upon which the English courts rely in passing

¹ Marsden, *Perpetuities*, 73.

upon them, are clearly stated by Jessel, M. R., in *Miles v. Harford*,¹ as follows:

“As I understand the rule of law, it is a question of expression. If you have an expression giving over an estate on one event, and that event will include another event which itself would be within the limit of perpetuities, or, as I say, the Rule against Perpetuities, you cannot split the expression so as to say if the event occurs, which is within the limit, the estate is to go over, although, if the event does not occur, the gift over is void for remoteness. In other words, you are bound to take the expression as you find it, and if, giving the proper interpretation to the expression, the event may transgress the limit, then the gift over is void.

“What I have said is hardly intelligible without an illustration: On a gift to A for life, with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to A for life, with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a gift superadded, ‘or if he shall have no son,’ is valid, and takes effect if he has no son, yet both these events are included in the other event, because a man who has no son certainly never has a son who attains twenty-five or takes priest's orders in the Church of England, still the alternative event will take effect, because that is the expression.

“The testator, in addition to his expression of a gift over, has also expressed another gift over, on another event, although included in the first event, but the same judges who have held that the second gift over will take effect where it is expressed have held that it will not

¹ 12 Ch. D. 691, 702-5, as quoted by Professor Gray.

take effect if it is not expressed, that is, if it is really a gift over on the death before attaining twenty-five, or taking priest's orders, although, of course, it must include the case of there being no son. That is what they mean by splitting, they will not split the expression by dividing the two events, but when they find two expressions, they give effect to both of them, as if you had struck the other out of the will. That shows it is really a question of words and not an ascertainment of a general intent, because there is no doubt that the man who says that the estate is to go over if A has no son who attains twenty-five, means it to go over if he has no son at all, it is, as I said before, because he has not expressed the events separately, and for no other reason. That is my view of the authorities. This is a question of authorities.

“Now we come to the case we have before us. The estate is to go over if any of his sons get another estate, that is, if any one of his sons who has got possession of this estate, gets one of the other estates, or if any of the issue male of the body of any of the sons gets the estate. Here you have two events expressed. He might have said, if any of the issue male of my body get the estate, which would have included both events, and then you could not have split it up; but he has not said so. He has divided it for some reason or other, probably a conveyancer's one because it is an alteration of a conveyancer's form. The words ‘sons’ and ‘issue male’ are both added, but he has divided that and suggests two events, then and in any of the events ‘and so often as the same shall happen the uses hereby limited of and concerning my freehold hereditaments to or in trust for any such younger son or whose issue male shall for the time being become entitled aforesaid, and to or in trust for his issue male shall absolutely cease.’ That is, there is a cessor of the estate either of the

younger son or the issue male of the younger son. Why should I alter the words? Why should I say that the event of the younger son properly expressed succeeding to the estate being in due time is to be void for remoteness? The reason suggested to me is this, it is quite plain he means it to go along the whole line, I agree.

“So in the case of a man dying without a son attaining twenty-five. That is not good although he means it to apply to the case of his having no son, and there is none. It is not what he means as to the event, but whether he has expressed the event on which the estate is to cease, so as to bring one alternative within the limits, and if he has chosen to say the estate is to cease first of all, as he might have said, if a younger son becomes a peer or attains the age of fifty, or any other event within the limits, or any of the issue male of my younger sons shall become a peer, one gift over might be valid, he might have said if any of my issue male shall become a peer, or if the issue male of my younger son become a peer thereupon the estate shall go over, that would have been different, but I think I have no right to alter the expression. The law is purely technical. The expressions are there, and using them gives effect to the real intention. Why should I go out of my way to extend technical law to a case to which it has not hitherto been extended? It seems to me that I ought to read the expressions as I find them. The event which is expressed has happened. It is within legal limits, and I think the estate should go over.”

“Thus a gift to B. if no child of A. reaches twenty-five, is bad, although A. dies without children; while if the gift over had been if A. dies without children, or if his children all die under twenty-five, then on A’s death without children, the gift over would have taken effect.”¹

¹ Gray, *Perpetuities*, 2nd Ed., § 331.

Professor Gray, after quoting the foregoing remarks of Jessel, M. R., adds: "The doctrine that where a testator has not himself separated limitations, the law will not separate them for him, is spoken of, by Jessel, M. R., in *Miles v. Harford*, as "technical," but it is an almost necessary doctrine, because the line of separation may be drawn at an infinite number of places, and there is nothing to determine which of them shall be taken." ¹

§ 438. An illustration of the class of cases where the gift is split by the grantor or testator is found in *Schettler v. Smith*.² In that case the testator himself expressly made alternative gifts, one gift limited upon the death of the widow of his son if the son should leave a widow, which was held bad, because such widow might be a person not in being at the death of the testator; and another gift limited upon the death of the son without leaving a widow, in which latter event the gift over was good.³ In *Kiah v. Grenier*,⁴ there were alternative dispositions limited to take effect upon or after the termination of the life of a designated person in being. One of these dispositions was limited upon the contingency that that person should leave no issue or widow surviving, and other dispositions were limited upon other contingencies.⁵

§ 439. An illustration of the opposite class of cases where the gift is not split by the grantor or testator, is

¹ Perpetuities, 2nd Ed., § 354 *a*.

² 41 N. Y. 328.

³ See *Matter of Wilcox*, 194 N. Y. 288, 294.

⁴ 56 N. Y. 220.

⁵ *DeKay v. Irving*, 5 Den. 646, 654; *Wilson v. White*, 109 N. Y. 59, 61; *Kelso v. Lorillard*, 85 N. Y. 177, 182; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108, 114, 115; *Genet v. Hunt*, 113 N. Y. 158; *Matter of Murray*, 75 App. Div. 246.

found in *Matter of Wilcox*.¹ In that case the testator bequeathed one third of his residuary estate "to my said executors in trust for the purpose of paying the income thereof to my daughter, Frances D. Wilcox, for and during the term of her natural life, annually, and at her decease I give, devise and bequeath to her issue, share and share alike, such income, and as each of her said issue shall attain the age of twenty-one years, I give, devise and bequeath to it one equal undivided share of the principal of said remaining third, and in case my said daughter, Frances D. Wilcox, shall die, leaving no issue born to her, which shall attain the age of twenty-one years, then and in such case, said remaining third of my residuary estate, I give, devise and bequeath to my daughter, Maria E. Sanders, and my son Charles McCoy, share and share alike forever." Frances left no issue her surviving. The property involved was personal property. The trust during minority for such issue as Frances might leave surviving her was held invalid on the ground that they might be persons not in being at the creation of the estate; the contingent remainder over was invalid because it was not required to vest, if ever, by the end of two designated lives in being; but it was claimed that there was an implied alternative gift to take effect at the death of Frances in the event, which in fact occurred, that she left no issue surviving. But this view of the matter was rejected by the Court of Appeals. "If the learned court [below] intended to assert that the gift over by itself implied alternatives, to wit, a gift on the contingency that Frances died without issue her surviving—a gift that would have been unquestionably good—and a gift on the contingency that no issue that she might leave should reach majority such a doctrine seems to be in

¹ 194 N. Y. 288.

direct opposition to the decided cases. It is said by Professor Gray in his work on Perpetuities, section 331: "Very often, indeed generally, a future contingency which is too remote may in fact happen within the limit prescribed by the rule against perpetuities, and a gift conditioned on such contingency may be put into one of two classes according as the contingency happens or does not happen within those limits; but unless this division into classes is made by the donor, the law will not make it for him, and the gift will be altogether bad." ¹

§ 440. As applied to the English Rule against Perpetuities, there is an exception to the principles in relation to splitting, already discussed, which, although not yet considered by the courts in New York, should here be stated. Mr. Marsden ² states it as follows: "There is an important exception to the rule just stated [splitting] where a devise of real estate is expressed to take effect upon an event which includes two contingencies,

¹ Matter of Wilcox, 194 N. Y. 288, 294; Matter of Howland, 75 App. Div. 207. Compare what might have been done by the testator in Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, in splitting the provision in the codicil, according to whether or not the beneficiary should or should not survive the two designated lives. See also Proctor v. Bishop of Bath and Wells, 2 H. Bl. 358; Miles v. Harford, 12 Ch. D. 691, 702-5 and other cases cited by Professor Gray, Perpetuities, 2nd. Ed. § 331 *et seq.*; Marsden, Perpetuities, § 72; Brown v. Evans, 34 Barb. 594.

It is difficult to harmonize the decision in Schlereth v. Schlereth, 173 N. Y. 444, with the principles set forth in Matter of Wilcox, 194 N. Y. 288, and Schettler v. Smith, 41 N. Y. 368, on account of the splitting of the gift which was effected by paragraph VIII of the will, (see the dissenting opinion of Laughlin, J., 73 App. Div. 283), unless the decision was predicated upon the view that the several alternatives as stated in paragraphs VII, VIII, and IX, were so interwoven as to indicate that paragraph VIII, when read in connection with the others, also contemplated a further and illegal suspension or postponement of vesting.

² Perpetuities, 73-4.

one of which is such, that, if it happens, the devise will operate by way of remainder, though if the other happens, it will operate as an executory limitation. In this case the devise may be "split," and if the event so happens, it will take effect as a legal remainder; though, if the alternative event were to happen it would be void for remoteness." In view of the disappearance of the old distinctions, it would apparently be impossible to draw any such distinction under the law of New York.¹ Another point worthy of notice concerning the principles in relation to "splitting," is thus stated by Mr. Marsden:² "The rule which requires the several events upon which a limitation is intended to take effect to be expressed separately, where any one of them may occur beyond the legal period, does not apply to a clause affecting separate or distinct limitations or interests, as to some, but not all, of which its operation would be too remote. Such a clause will be valid, and will take effect in those cases where it cannot operate remotely, though as to the others it is void for remoteness."

3. *Contingencies with an Alternative Application.*

§ 441. There are two leading cases that well illustrate this class.

§ 442. (a.) *Purdy v. Hayt*.³ Here testator devised land to his sisters Jane and Catherine, as tenants for life with cross remainders; and after the death of both,

¹ See *Matter of Wilcox*, 194 N. Y. 288; *Evers v. Challis*, 18 Q. B. 224, 231; 7 H. L. C. 531, and other cases cited in *Gray, Perpetuities*, 2nd Ed. §§ 338 *et seq.* Also XI *Columbia Law Review*, 270. § 300 *supra*.

² *Perpetuities*, 79, citing, *Cromek v. Lumb*, 2 Y. & C. C. C., 565; *Arnold v. Congreve*, 1 Russ. & M. 209; *Peard v. Kekewich*, 15 Beav. 166, and other cases.

³ 92 N. Y. 446.

then to Elizabeth for life; and at her death the principal to be divided equally between any children Elizabeth might leave surviving. The following points call for special attention:

(1) The ultimate remainder is contingent.

(2) The interests of Jane and Catherine, although undivided, are to be contemplated as distinct shares.

(3) The share of the sister first dying is limited to pass through three successive life estates before reaching the ultimate remainder, while the share of the sister second to die is limited to pass through only two successive life estates before reaching the ultimate remainder. For suppose Jane to be the one first to die. Her share has then passed through one life, and goes in cross remainder to Catherine, whose life constitutes a second successive life. On her death it is limited to Elizabeth for life, but as this estate is the third in succession it must be cut off.¹ The ultimate remainder, however, is contingent, and the persons entitled to it cannot be known until Elizabeth's death. A contingent remainder cannot be accelerated to take effect at the close of the second successive life estate. The statute on this point refers only to vested remainders.² Therefore as to this share the ultimate remainder is illegal. Recurring now to Catherine's own share, at her death it has passed through but one life. Jane's prior death having removed the possibility of a cross remainder on this share, it passes at once to Elizabeth. On her death it has passed through but two lives, and may, therefore, vest in remainder in her surviving children.

(4) Looking at the limitations as they stand in the will it is evident that the ultimate remainder will be

¹ *Supra*, § 320.

² *Purdy v. Hayt*, 92 N. Y. 446, 452; *Dana v. Murray*, 122 N. Y. 604, 618.

good as to one share, and will be bad as to the other. Which share it is that will be affected by the invalidity, cannot possibly be determined beforehand. This uncertainty is of a different character from that involved in the preceding classes, for here the uncertainty arises out of the question as to which share it is that is to be affected by an illegal remainder. Until one tenant or the other dies, the uncertainty involves all portions of the property.

Inasmuch as this uncertainty must cease, and the share with the illegal remainder must be ascertained, within the statutory period, it was held that the entire remainder is not invalid, and that when, by the death of either Jane or Catherine, it is ascertained which ultimate remainder is void, it may be cut off, while the ultimate remainder on the other share may be preserved. For during the term it cannot be said of any particular share or portion, that the limitation as to that share is such that it may be unduly suspended. There may be an undue suspension, but it is impossible to charge it beforehand upon any particular property. As the court say: the "rule relates to cases where, if the limitations take effect, in their order, as contemplated by the grantor or devisor, some of the estates will not vest within the prescribed period, * * * ." ¹

§ 443. (b.) *Dana v. Murray.*² Here land was given in trust for one life, with a power of appointment by will in the beneficiary. At the death of this beneficiary, therefore, the property had already passed through one life. Apart from certain provisions not here in point, the grantee of the power devised the land to four tenants in common, for life, with cross remainders, and with a further contingent ultimate remainder. It was

¹ Also *Matter of Ewen*, 7 Misc. 619.

² 122 N. Y. 604.

contended, that under the authority of *Purdy v. Hayt*, (*supra*), the share of the one who might prove to be the fourth to die would have passed through only two lives in all, and that the remainder might therefore be sustained. But the court, in deciding to the contrary, point out the distinction that here the uncertainty as to which tenant will be the fourth to die cannot of course be determined until three other lives have expired. In other words, an uncertainty of the character here under discussion is fatal to all the ultimate remainders, unless it must cease, and the remainders become capable of final classification as valid or invalid, by the end of the statutory period.¹

¹ See also *Matter of Perry*, 48 Misc. 285; *Graham v. Graham*, 49 Misc. 4. Compare (cross remainders in trust) *Brown v. Richter*, 76 Hun, 469, *aff'd* 144 N. Y. 706; *Duncklee v. Butler*, 38 App. Div. 99; *Walsh v. Waldron*, 63 Hun, 315, *aff'd* 135 N. Y. 650; *Simpson v. Trust Co. of America*, 129 App. Div. 200, *aff'd* 197 N. Y. 586; *Hardenbergh v. McCarthy*, 130 App. Div. 538.

CHAPTER XI.

CONSTRUCTION.

§ 444. The following sections are devoted to references to certain general rules of construction not mentioned in other chapters, and selected for attention here on account of their special bearing on the main topics under discussion.

§ 445. Here, as elsewhere, the leading principle of construction is, that the duly expressed and ascertained intent is controlling.¹ And to this end even dispositions which are in themselves void may be referred to for aid in ascertaining the intent as to other dispositions.²

§ 446. If the provisions of the instrument are free from reasonable doubt as to their intended meaning they should first be construed as if the Rules relating to suspension, or postponement of vesting, did not

¹ Real Prop. L. § 240, subd. 3; *Roosa v. Harrington*, 171 N. Y. 341, 348, 350; *French v. Carhart*, 1 N. Y. 96; *Heath v. Hewitt*, 127 N. Y. 166, 173; *Robinson v. Martin*, 200 N. Y. 159, 164; *Scholle v. Scholle*, 113 N. Y. 261, 273; *Holly v. Hirsch*, 135 N. Y. 590; *Parks v. Parks*, 9 *Pai.* 107; *Hillen v. Iselin*, 144 N. Y. 365, 374; *Cotton v. Berkelman*, 142 N. Y. 160, 163; *Towler v. Towler*, 142 N. Y. 371, 374, 376; *Starr v. Starr*, 132 N. Y. 154; *Lougheed v. D. B. Church*, 129 N. Y. 211, 217; *Kernochan v. Marshall*, 165 N. Y. 472, 478; *Morton v. Woodbury*, 153 N. Y. 243; *Matter of Tompkins*, 154 N. Y. 634, 645; *Matter of Title G. & T. Co.*, 195 N. Y. 339. See also *Tilden v. Green*, 130 N. Y. 29, 52.

² *Morton v. Woodbury*, 153 N. Y. 243; *Lougheed v. B. B. Church*, 129 N. Y. 211, 217. On the question of what it was that he intended by what he said, a testator is deemed to be speaking as of the time when he executed his will. *Matter of Hoffman*, 201 N. Y. 247, 255.

exist, and those Rules should be resorted to after the meaning has thus been determined, and then only for the purpose of ascertaining whether the provisions, as so construed, are valid or void.¹ But if it appears that there is fair room for two constructions, the Court will take the existence and application of the Rules into account, and will adopt that one of the permissible constructions which will preserve, rather than that which would defeat the validity of the instrument.²

§ 447. "The reports show an increasing tendency in the direction of liberality in construing the statutes relating to suspension of the power of alienation, and while there has been no abatement by the courts of the strictness with which limitations are construed, which transgress the rule on that subject, arrangements within the limit, and dispositions by way of trust, are sustained if they can fairly be brought within the spirit of the

¹ *Cottman v. Grace*, 112 N. Y. 299, 309; *Matter of Russell*, 5 Dem. 388; *Colton v. Fox*, 67 N. Y. 348, 351; *Van Nostrand v. Moore*, 52 N. Y. 12; *Central Trust Co. v. Egleston*, 185 N. Y. 23, 29, 33; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 91, 92.

² *Butler v. Butler*, 3 Barb. Ch. 304; *Doubleday v. Newton*, 27 Barb. 431, 440; *Post v. Hover*, 33 N. Y. 593, 601; *DuBois v. Ray*, 35 N. Y. 162, 170-1; *Roe v. Vingut*, 117 N. Y. 204, 212, 218; *Manice v. Manice*, 43 N. Y. 303, 371; *Vanderpoel v. Loew*, 112 N. Y. 167, 177; *N. Y. Life Ins. & T. Co. v. Cary*, 191 N. Y. 33, 39; *Mee v. Gordon*, 187 N. Y. 300, 310; *Denison v. Denison*, 185 N. Y. 438, 445; *Trask v. Sturges*, 170 N. Y. 482, 495-496; *Haug v. Schumacher*, 166 N. Y. 506, 513; *Williams v. Jones*, 166 N. Y. 522; *Steinway v. Steinway*, 163 N. Y. 183, 201; *Chwatal v. Schreiner*, 148 N. Y. 683; *Locke v. F. L. & T. Co.*, 140 N. Y. 135, 150; *Cochrane v. Schell*, 140 N. Y. 516; *Close v. Farmers' L. & T. Co.*, 195 N. Y. 92, 99; *Kent v. Kent*, 99 App. Div. 112; *Forsyth v. Rathbone*, 34 Barb. 388, 403; *Martelli v. Holloway*, 5 H. of L. 532, cited by *Farwell, Powers*, 1st Ed. p. 230. As to the arguments on the question of construction, that testator is to be presumed to know the law, and not to have intended what would be illegal; or that he is to be assumed to have intended to make a valid will; compare with the cases last cited. *Van Nostrand v. Moore*, 52 N. Y. 12, 22; *Crooke v. County of Kings*, 97 N. Y. 421, 438; *Manice v. Manice*, 43 N. Y. 303, and the various rules of construction mentioned in this chapter.

statute, although not within its literal language.”¹ And in a case of doubtful construction the courts may lean to a meaning favored by present public policy, even though that differs from the policy existing when the instrument went into effect.²

§ 448. Effect must be given if possible to every part of the instrument.³ And the law favors a construction that will avoid intestacy;⁴ and favors a devise or bequest in absolute form as against less clear and positive later dispositions that might cut it down.⁵

§ 449. Neither the technical nor the ordinary meaning of given words will be allowed, as such, to override the meaning clearly intended by the testator.⁶

§ 450. In order to give effect to the intent as clearly shown, the court may transpose, reject or supply words,

¹ *Cochrane v. Schell*, 140 N. Y. 516, 532.

² *Chwatal v. Schreiner*, 148 N. Y. 683, 690.

³ *Terry v. Wiggins*, 47 N. Y. 512; *Matter of Tompkins*, 154 N. Y. 634, 645.

⁴ *Shult v. Moll*, 132 N. Y. 122, 127; *Dubois v. Ray*, 35 N. Y. 162; *Hoppock v. Tucker*, 59 N. Y. 203; *Phillips v. Davies*, 93 N. Y. 199; *Ferry v. Sampson*, 112 N. Y. 415; *Lamb v. Lamb*, 131 N. Y. 227; *Mitchell v. Thorne*, 134 N. Y. 536; *Matter of McClure*, 136 N. Y. 238; *Matter of Tompkins*, 154 N. Y. 634, 645; *Johnson v. Brasington*, 156 N. Y. 181; *Meeks v. Meeks*, 161 N. Y. 66, 71; *Barson v. Mulligan*, 191 N. Y. 306, 325; *Close v. F. L. & T. Co.*, 195 N. Y. 92, 100; compare *Matter of Hoffman*, 201 N. Y. 247, 256.

⁵ *Clay v. Wood*, 153 N. Y. 134; *Williams v. Boul*, 101 App. Div. 593, *aff'd* 184 N. Y. 605; *Washbon v. Cope*, 144 N. Y. 287, 297; *Shult v. Moll*, 132 N. Y. 122; *Banzer v. Banzer*, 156 N. Y. 429; *Goodwin v. Codrington*, 154 N. Y. 283; *Redfield v. Redfield*, 126 N. Y. 466; *Benson v. Corbin*, 145 N. Y. 351, 359; *Howland v. Clendening*, 134 N. Y. 305; *Mee v. Gordon*, 187 N. Y. 400, 407; *Kinkele v. Wilson*, 151 N. Y. 269; *Bradhurst v. Field*, 135 N. Y. 564; *Matter of McClure*, 136 N. Y. 238; *Underwood v. Curtis*, 127 N. Y. 523; *Viele v. Keeler*, 129 N. Y. 190.

⁶ *Schmidt v. Jennett*, 195 N. Y. 486; *Lawton v. Corlies*, 127 N. Y. 100; *Heath v. Hewitt*, 127 N. Y. 166; *Lythe v. Beveridge*, 58 N. Y. 592; *Hillen v. Iselin*, 144 N. Y. 365.

phrases or provisions.¹ It would appear that this familiar rule might be more fully expressed by saying that if a given intent is evident upon a consideration of the entire will, the court will give it precedence over minor and unconvincing indications of a contrary intent based upon the mere position, presence or absence of particular words, phrases or provisions. And there is a so-called rule of last resort, that in case of wholly irreconcilable repugnancy the later clause or codicil prevails.² In relation to the distinction between vested and contingent future estates, certain further points here call for mention.

§ 451. The law favors the vesting of estates, and as early as may be, and a remainder is not to be considered contingent in any case where, consistently with the intent, it may be regarded as vested.³ Reference may here be made to the proposition, that the use, in connection with the gift of a future estate, of such terms as "from and after," "then," "upon the death," does not in itself render the remainder contingent. The intent controls.⁴

¹ *Starr v. Starr*, 132 N. Y. 154.

² *Everitt v. Everitt*, 29 N. Y. 39, 83; *Crozier v. Bray*, 120 N. Y. 366; *Van Nostrand v. Moore*, 52 N. Y. 12, 20; *Adams v. Massey*, 184 N. Y. 62; *Henderson v. Merritt*, 10 App. Div. 397; *Trustees v. Kellogg*, 16 N. Y. 83, 88.

³ *Embury v. Sheldon*, 168 N. Y. 227, 236; *Bowditch v. Ayrault*, 138 N. Y. 222; *Stokes v. Weston*, 142 N. Y. 433; *Williams v. Jones*, 166 N. Y. 522, 539; *Nelson v. Russell*, 135 N. Y. 137; *Hersee v. Simpson*, 154 N. Y. 496, 500; *Goodwin v. Coddington*, 154 N. Y. 283; *Matter of Sebeck*, 140 N. Y. 241; *Kernochan v. Marshall*, 165 N. Y. 472; *Connelly v. O'Brien*, 166 N. Y. 406, 408. But a contrary intent, duly shown, will control. *McGillis v. McGillis*, 154 N. Y. 532, 539-40; *Dougherty v. Thompson*, 167 N. Y. 472, 483.

⁴ *Nelson v. Russell*, 135 N. Y. 137; *Matter of Seaman*, 147 N. Y. 69; *Corse v. Chapman*, 153 N. Y. 466; *Matter of Tompkins*, 154 N. Y. 634; *Hersee v. Simpson*, 154 N. Y. 496; *Matter of Young*, 145 N. Y. 535; *Losey v. Stanley*, 147 N. Y. 560, 567; *Miller v. Gilbert*, 144 N. Y. 68; *Radley v. Kuhn*, 97 N. Y. 26, 35; *Tucker v. Tucker*, 5 N. Y. 408; *Roome v. Phillips*,

§ 452. There are also numerous presumptions illustrated by those in favor of the widow,¹ and the heirs,² as variously classified, according to the facts in given cases, as related to the ancestral blood; issue; descendants;³ in favor of equality among children, in distributing estates;⁴ against the disinheritance of remaindermen who may happen to die before the determination of the precedent estate;⁵ the principles governing residuary clauses;⁶ and codicils.⁷

24 N. Y. 463; *Ackerman v. Gorton*, 67 N. Y. 63; *Livingston v. Greene*, 52 N. Y. 118; *Taggart v. Murray*, 53 N. Y. 233. Compare (contingent) *McGillis v. McGillis*, 154 N. Y. 532, 541; *Matter of Bowers*, 109 App. Div. 566, aff'd 184 N. Y. 574; *Matter of Baer*, 147 N. Y. 344.

¹ *Moffett v. Elmendorf*, 152 N. Y. 475, 482; *Stimson v. Vroman*, 99 N. Y. 80; *Horstman v. Flege*, 172 N. Y. 381; see *Matter of Gorden*, 172 N. Y. 25.

² *Goodwin v. Coddington*, 154 N. Y. 283; *Mullarky v. Sullivan*, 136 N. Y. 227; *Soper v. Brown*, 136 N. Y. 244; *Matter of Truslow*, 140 N. Y. 599, 605; *Close v. F. L. & T. Co.*, 195 N. Y. 92, 100; *Knowlton v. Atkins*, 134 N. Y. 313, 321.

³ *March v. March*, 186 N. Y. 99; *Goodwin v. Coddington*, 154 N. Y. 283; *Knowlton v. Atkins*, 134 N. Y. 313, 321.

⁴ *Stokes v. Weston*, 142 N. Y. 433, 439.

⁵ *Connelly v. O'Brien*, 166 N. Y. 406, 408, and cases there cited. Compare *Lewisohn v. Henry*, 179 N. Y. 352; *Haug v. Schumacher*, 166 N. Y. 506, 516, and cases there cited; *Williams v. Jones*, 166 N. Y. 522; *Wilber v. Wilber*, 165 N. Y. 451; *Matter of Crane*, 164 N. Y. 71; *Matter of Traver*, 161 N. Y. 54; *Dougherty v. Thompson*, 167 N. Y. 472, 483; *Kelso v. Lorillard*, 85 N. Y. 177, 184; *Lewis v. Howe*, 174 N. Y. 340, 346; *Dimmick v. Patterson*, 142 N. Y. 322; *Matter of Seebeck*, 140 N. Y. 241; *Zartman v. Ditmars*, 37 App. Div. 173; *Smith v. Smith*, 141 N. Y. 29.

⁶ *Matter of Miner*, 146 N. Y. 121; *Matter of Title G. & T. Co.*, 195 N. Y. 339; *Seibert v. Miller*, 34 App. Div. 602; *Lamb v. Lamb*, 131 N. Y. 227. Compare *Matter of Dewitt*, 113 App. Div. 790, aff'd 188 N. Y. 567; *Matter of Benson*, 96 N. Y. 499; *Riker v. Cornwell*, 113 N. Y. 115; *Moffett v. Elmendorf*, 152 N. Y. 475; *Matter of Allen*, 151 N. Y. 243; *U.S.T. Co. v. Black*, 146 N. Y. 1; *Morton v. Woodbury*, 153 N. Y. 243; *Thomas, Estates Created by Will*, II, pp. 1568-1603. Residue of residue, *Booth v. Baptist Church*, 126 N. Y. 215, 245; *Matter of Hoffman*, 201 N. Y. 247.

⁷ *Westcott v. Cady*, 5 Johns. Ch. 334; *Pierpont v. Patrick*, 53 N. Y. 591; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86.

§ 453. Sometimes presumptions, rules or leanings conflict, and in that event certain of them are regarded as stronger than others.¹

§ 454. A grantor or testator is at liberty to create either a vested or a contingent future estate, as he sees fit.² But this does not mean that he can make it vested or contingent by merely calling it so. His intent is controlling in determining whether he meant to create an estate having the characteristics which are mentioned in the statutory definition of a vested future estate, or one having the characteristics which are mentioned in the statutory definition of a contingent future estate; and this intent being duly ascertained it is then for the first time that the statutory definitions come into play and operate to classify the estate accordingly as vested or contingent. Thus if a future estate is limited to a person not yet in being it must, under the statute, be contingent, even though the creator of the estate describes it in terms as vested.³

§ 455. Now these statutory definitions have given rise to much controversy. The question has been, whether they are intended to perpetuate the form of the common law definitions, or in one important respect to change it. For at the common law, in order to render a remainder vested, it was necessary, among other

¹ *Quinn v. Hardenbrook*, 54 N. Y. 82; *Matter of McClure*, 136 N. Y. 238; *Johnson v. Brasington*, 156 N. Y. 181, 186; *McGillis v. McGillis*, 154 N. Y. 532, 540.

² *Real Property Law*, 240, sub. 3; *Matter of Brown*, 154 N. Y. 313, 323-4; *McGillis v. McGillis*, 154 N. Y. 532, 539-40; *Dana v. Murray*, 122 N. Y. 604; *Lewisohn v. Henry*, 179 N. Y. 352, 361; *Haug v. Schumacher*, 166 N. Y. 506, 513; *Clark v. Cammann*, 160 N. Y. 315, 325; *Miller v. Gilbert*, 144 N. Y. 68, 73; *Sawyer v. Cubby*, 146 N. Y. 192, 195; *Matter of Seebeck*, 140 N. Y. 241, 246; *Bowditch v. Ayrault*, 138 N. Y. 222; *Matter of Tatum*, 169 N. Y. 514, 520.

³ *Smith v. Smith*, 141 N. Y. 29.

things, that there should be a person in being who "answered to the description" imposed by the instrument. So long as there was no one answering to the description, even though there was a person who would at once answer to it if the precedent estate were to cease, the remainder could not vest. This proposition rested on the principle that the intent of the creator of the estate, as thus indicated, was to be observed, and the law found, in the adoption of a form of description to which no one could answer until a future time, one indication of an intent to postpone the vesting, by incorporating a conditional element into the gift.

§ 456. The common law principle which includes this point is thus stated by Professor Gray: "If the conditional element is incorporated into the description of, or the gift to the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus [1] on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested subject to being divested by its death.¹ But [2] on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."²

§ 457. The distinguishing characteristics of a vested remainder at common law, were that (subject always, and only, to its own lapse, or defeat, in the meantime) it was constantly capable, so long as it lasted, of at once taking effect in possession upon the termination of a precedent estate which must terminate on the happen-

¹ Gray, *Perpetuities*, 2nd Ed., § 108, citing *Littlejohns v. Household*, 21 Beav. 29; *Blanchard v. Blanchard*, 1 All. 223; *Jeeffers v. Lampson*, 10 Ohio St. 101.

² Gray, *Perpetuities*, 2nd Ed., § 108; citing *Price v. Hall*, L. R. 5 Eq. 399; *Olney v. Hull*, 21 Pick. 311, and many other cases.

ing of an event sure to happen some time, and which might terminate before the remainder itself should expire.

§ 458. Fearne,¹ sums up this doctrine in the following words: "In short, upon a careful attention to this subject, we shall find, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person in esse, and ascertained, that the precedent estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding estate * * * is limited so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not in esse or not ascertained; or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect; then the remainder is contingent."

§ 459. "It may be proper to explain the distinction betwixt that kind of uncertainty which makes a remainder contingent, and an uncertainty of a different kind which appears to have been sometimes confounded with it; I mean the uncertainty of a remainder's ever taking effect in possession. * * * For wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person in esse and ascertained; in that case notwithstanding the nature and duration of the estate limited in remainder may be such as that it may not endure beyond the par-

¹Contingent Remainders, 217.

ticular estate; and may therefore never take effect or vest in possession, yet it is not a contingent but a vested remainder.”¹

§ 460. “It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life * * * is and must be liable; as the remainderman may die * * * before the death of the tenant for life.² The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.”³

§ 461. “A vested remainder may be uncertain as well as a contingent remainder * * * but * * * it is only uncertain on account of the uncertainty of its duration in relation to the duration of the particular estate. No condition is to be fulfilled, no event to happen, before the right of future possession or enjoyment can be perfect; nothing is wanted to render the capacity of possession or enjoyment complete. * * * A vested remainder is sure ultimately to take effect in possession or enjoyment, if only it endures beyond the preceding estate.”⁴

§ 462. And Mr. Williams says: “If any estate, be it ever so small, is always ready, from its commencement

¹ *Id.* 215-16.

² Where there is an absolutely vested remainder in fee, the remainderman himself may die before the termination of the precedent estate. But in that case his heirs take through him. The existence of this possibility does not interfere with the vested nature of the remainder. It is a question of the intent. *Van Axte v. Fisher*, 117 N. Y. 401; *Connelly v. O'Brien*, 166 N. Y. 406; *Riker v. Gwynne*, 201 N. Y. 143.

³ *Fearne, Contingent Remainders*, 215-16.

⁴ “An Original View,” etc., being Vol. II of the 10th ed. of *Fearne on Contingent Remainders*, § 180 *et seq.*

to its end, to come into possession the moment the prior estates, be they what they may, happen to determine, it is then a vested remainder. * * * It would be an estate in possession were it not that other estates have a prior claim; and their priority alone postpones, or perhaps may entirely prevent, possession being taken by the remainderman. The gift is immediate; but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession.”¹ “As distinguished from a vested remainder,” a contingent remainder is an estate which is *not* ready, from its commencement to its end, to come into possession at any moment when the prior estates may happen to determine.”²

§ 463. The reason why the different classes of contingent remainders are not ready to vest in possession, is seen from Blackstone’s familiar definition, in which he says: “Contingent or executory remainders (whereby no present interest passes), are where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event.”³ It has already been stated that if a remainder is vested, there must be a remainderman in esse, and ascertained. But to fulfil this requirement he must answer the description imposed upon the remainderman by the instrument. Thus a devise of an estate to A for life, remainder to the heirs of B, gives to B’s children, during his life, only a contingent remainder. For they are to take only in their capacity as heirs of B, and while he lives they do not answer to that description. In other words, during B’s life there are no persons in esse and ascertained, of whom it could be said

¹ Real Property, 253.

² Id. 267.

³ 2 Bl. Comm. 169.

“they are the persons to whom the testator has given the remainder in fee;” for he gave it to the heirs of B, and there are now no heirs of B in existence.

§ 464. Such was the distinction drawn at the common law between vested and contingent remainders. But it is of the first importance to keep in mind the fact that the mere existence of these formal definitions was only the first step toward ascertaining in any given instance whether a particular remainder was vested or contingent. For as each new case came in question, it was still necessary to determine whether or not it had the characteristics essential to a vested remainder. It was well to ascertain the rule that if it had that character then it was vested. But did it have that character? Now it is clear that the answer must depend on the intention of the grantor or deviser, either as expressed; or inferred; or assumed in accordance with settled and sometimes apparently arbitrary rules of construction.

§ 465. The meaning of the principle according to which the remainder in the second of the two cases given by Professor Gray,¹ was held contingent, and that in the first case vested, is that the law saw, or assumed, in the phraseology employed in the second will, an intent that there should not be persons in esse and ascertained, during A's life, capable, in the capacity in which they then existed, of taking the remainder whenever the precedent estate determined. In other words, the acquisition of the required capacity constituted a collateral contingency which must happen before vesting. And so, applying the common law definitions, the law found the remainder to be contingent. While in the will first mentioned, it found an equally clear in-

¹ *Supra*, § 456.

tent that the children, in the capacity which they then held, should be capable at every moment of taking the remainder in possession, whenever the precedent estate determined, subject to having their rights cut off in case of the happening of a designated condition subsequent; and again applying the same definitions, it found that this remainder was vested.¹

§ 466. Turning now to the New York Revised Statutes and the Real Property Law, it is provided that "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."² Now it has been said,³ that these statutory provisions were intended to effect a radical change in the distinction theretofore existing between the terms vested and contingent. It has been said that the description of vested future estates was intended to be taken with absolute literalness, and that the purpose and result of the adoption of this section was to make the distinction turn solely on the question whether there are human beings in existence who, no matter whether the capacity in which they now exist does or does not correspond with that set forth in the instrument creating the estate, would as a matter of fact become at once entitled to the remainder in possession if the precedent estate should now terminate.

¹ Such also was the case in *Smith v. Scholtz*, 68 N. Y. 41. 61. For general authorities on remainders vested and contingent at common law, see *Greenleaf's Cruise*, Vol. II, Tit. XVI (202 *et seq.*); 4 Kent, Comm. Lect. 59; *Challis on Real Property*, Part II, Ch. XI, XII; *Williams on Real Property*, Part II, Ch. I, II, III; *Reeves, Real Property*, Vol. II, Chap. 60.

² Real Prop. L., § 40.

³ *Moore v. Littel*, 41 N. Y. 66.

§ 467. If this is, in reality, the true construction of the statute, the resulting effect upon the validity of certain future estates would be great. For a remainder which is vested in interest, even though defeasibly, cannot be rendered invalid though the operation of the statutory requirements, embodied in Rule II, of vesting in interest by the end of the statutory period; while the same estate, if treated as contingent instead of defeasibly vested, would be invalid unless so limited that it must become vested in interest, if ever, by the end of that period.¹ It will be most convenient, first to gather the few, though weighty, authorities in favor of the view referred to, and then to set off against them the grounds for believing that in fact no such change in the law was either intended or effected. The authorities in favor of a change are as follows:

§ 468. *Moore v. Littel*.² The grant under consideration in that case, was to John Jackson "for and during his natural life, and after his decease to his heirs and their assigns." Habendum, to John Jackson "for and during his natural life, and after his death, then to his heirs," etc. At the common law, this disposition, under the operation of the Rule in Shelley's Case, would have given an estate in fee to John Jackson, and his heirs would not have taken any remainder as grantees. But as that rule had long ago been abrogated in New York,³ that difficulty was removed and John Jackson took merely a life estate. As the court say: "I concede that as a mere abrogation of the former rule, declared by the courts in England," (the Rule in Shelley's Case)

¹ Matter of Wilcox, 194 N. Y. 288.

² 41 N. Y. 66.

³ 1 R. S. 725, § 28; Real Prop. L., § 54; *Brown v. Wadsworth*, 168 N. Y. 225; *People's Trust Co. v. Flynn*, 188 N. Y. 385; *Webb v. Sweet*, 187 N. Y. 172.

* * * “the effect of the grant would be to give John Jackson an estate for life with remainder to those uncertain persons who might be his heirs at his death. And this remainder would be a contingent remainder at the common law, because, during his life, no person could answer that designation; and not alone for this reason, but because it could not be averred by any person that he would be the heir of John Jackson at the time when the life estate of the latter (the present estate), was determined * * *.”

§ 469. And the opinion of the court, per Woodruff, J., then proceeds as follows to consider whether the Revised Statutes, in their description of vested and contingent future estates, have not effected a change such as would render the remainder in question vested instead of contingent. “It is not, however, in my judgment, profitable nor necessary to the view which I intended to suggest, that I should pursue the consideration of the peculiar case created by the grant now in question, if it were to be governed by the refinements of the common law, under the influence of its feudal customs, restrictions, complications, and of the ingenuity and learning sometimes employed to avoid rather than give rational effect to the intention of the parties. It was one of the objects of our Revised Statutes to reduce to greater simplicity the rules governing the taking, holding and transmitting of real estate, and, especially, to favor the vesting of estates and the alienability thereof. * * * If there ‘is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested,’ within the terms of the statute. It is not ‘a person who now has a present fixed right of future possession or enjoyment,’ but a person

who would have an immediate right if the precedent estate were now to cease.

§ 470. "I read this language according to its ordinary and natural signification, and if you can point to a human being and say as to him, 'that man or that woman, by virtue of a grant of a remainder would have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease,' then the statute says, he or she has a vested remainder. It was argued on this appeal, that definitions of vested and contingent remainders in adjudged cases and text-writers have not been successfully attempted and that our revisers did not attempt to alter the law, or do more than describe what had already been adjudged to be vested, and what to be contingent. In my opinion, they have defined a vested remainder in terms that do clearly avoid much of the uncertainty in which the subject was before involved, and in such terms that it is now true that if there be a person in being of whom it can be positively averred, that if the estate for life were now to cease, he would have an immediate right of possession, he has a vested remainder, and notwithstanding subsequent events may defeat it, the operation of the statute itself is to make them subsequent conditions. * * * Without enlarging further, the statute, rejecting technical expressions and phrases heretofore employed, meant by person, just what it expresses and no more. 'When there is a person in being,' means when you can point to a human being, man, woman, or child; and 'who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate,' means that if you can point to a man, woman or child, who, if the life estate should now cease, would *eo instanti et ipso facto* have an immediate right of possession, then the remainder is vested, and, by necessary consequence, all the contingencies which may operate to

defeat the right of possession, are to operate and only to operate as conditions subsequent.”¹

§ 471. *Lawrence v. Bayard*,² is a case which the court cite in *Moore v. Littel*, to show that their view of the subject was not novel. There certain moneys were, upon the death of A, to be paid to the then surviving oldest son of W. It was held that during A's life, and while W and his two sons, B and C, were also alive, B, who was the oldest son, had a vested remainder, because, if A had then died he would thereupon prove to be the oldest then surviving son of W.

§ 472. *Mead v. Mitchell*,³ is also cited as an authority in *Moore v. Littel*. In that case there was an estate to trustees for the life of A, and after her death and in default of any appointment by her by will, to such persons of A's blood as would have inherited from her by descent. A was given the power to appoint the remainder to such persons of her blood as she might select. She had two children. It was held that they took a vested remainder during her life.

§ 473. These are the chief authorities⁴ in favor of

¹ In the previous case of *Sheridan v. House*, 4 Abb. Ct. App. Dec. 218, a majority of the court had held, in construing the same will, that the children took a vested remainder. And in *House v. Jackson*, 50 N. Y. 161 (see also *Jackson v. Sheridan*, 50 N. Y. 660) also arising out of the same will, the case of *Moore v. Littel* is cited and followed, and the court again hold that the interest of one of the children in his remainder, vested during the father's life. In this case the point was squarely in issue, and was essential to the decision reached, which was concurred in by all the judges. See also *Jackson v. Little*, 56 N. Y. 108; *House v. McCormick*, 57 N. Y. 310.

² 7 Pai. 70.

³ 17 N. Y. 210.

⁴ See, also, dicta in *Coster v. Lorillard*, 14 Wend. 265, 302; and in *Rome Exchange Bank v. Eames*, 4 Abb. Ct. App. Dec. 83, 98; also *Chism v. Keith*, 1 Hun, 589 (s. c. sub. nom. *Chinn v. Keith*, 4 T. & C. 126), where *Moore v. Littel* is followed, with the remark by the court: “If the deci-

the theory that the statutory definition is to be read in its strict and literal sense, instead of being regarded as merely perpetuating the former line of distinction.¹ We will now examine them, to ascertain their weight.

§ 474. First, then in point of time, came *Lawrence v. Bayard*.² The property there involved was personal property. The court expressly holds in that case, that the decision would be the same whether the remainder were vested or contingent, and bases its decision on principles which, as the court say, are in either view, equally applicable.

sion of the Court of Appeals in *Moore v. Littel* is to be taken as a correct exposition of the law, the devise in this case, to 'the heirs of the body of Mrs. Keith whom she shall leave hersurviving,' created a vested remainder in fee in the present plaintiff, and her brothers and sisters. * * * Such is the rule of law laid down in *Moore v. Littel*. It is a rule of property. We have no alternative but to follow it, whatever may be our own views of its correctness." See also, *Lockman v. Reilley*, 29 Hun, 434; *Drake v. Lawrence*, 19 Hun, 112; 2 *Reeves, Real Property*, 1156. The cases of future remainders to particular persons in their present capacity, as, for instance, to the "heirs" of A, a person already deceased, or to a designated and existing class, subject to being wholly or partially divested by the happening of a contingency subsequent, do not bear upon the question under discussion. The remainders in such cases are vested, and so they were at common law. The distinction is that in them the future devisees now answer to the description by which they are to take in remainder, and so the presumption of postponement, which is raised by designating them as "heirs" of a living person, does not arise. See, also, *Scott v. West*, 63 Wis. 529, 570-1; *Matter of Brown*, 93 N. Y. 295; *Minot v. Minot*, 17 App. Div. 521. So also, both at common law and under the Real Property Law, if it is seen that testator has used the word "heirs" loosely, to designate now living individuals, effect will be given to his intent, *Montignani v. Blade*, 145 N. Y. 111; *Heard v. Horton*, 1 Den. 168; see *Campbell v. Rawdon*, 18 N. Y. 412, 417. And the same rule applies in construing deeds. *Heath v. Hewitt*, 127 N. Y. 166. But unless the intent to use the word in an unusual or loose sense appears, it must be held, when referring to the "heirs" of a living person, to mean the as yet unascertained persons who will be his heirs when he dies. *Cushman v. Horton*, 59 N. Y. 149. See *Lake v. Ascher*, 132 N. Y. 684; *Wallace v. Diehl*, 202 N. Y. 156.

¹ See the cases cited by Professor Reeves, *Real Prop.*, Vol. II., p. 1157.

² 7 Pai. 70.

§ 475. Next came *Mead v. Mitchel*,¹ which presented the question whether a purchaser under a certain partition sale should be compelled to complete the purchase. His objections arose out of the following facts: Testatrix was owner, as tenant in common with one other, of certain real property. She left it, as already stated, in trust for the life of her niece, A, and after A's death to convey the same to such persons of the blood of A as would have inherited from A if she had died intestate. The suit for partition was brought during A's life, and while she had one child and one grandchild living. The trustee, and A, and the child, W, and grandchild, C, were made parties. The purchaser objected that the partition suit had not cut off the rights of possible yet-unborn children of A. The question for the court, therefore, was whether those rights had been cut off. This is considered from two points of view. First it is held that unborn heirs were "represented" by W and C, the child and grandchild, in whom, the court say, the remainder was vested subject to open. But over this question of the nature of the estate in W and C there appears to have been no controversy. The objection raised here by the purchaser seems to have been merely that, admitting the remainder to be defeasibly vested, still the future rights of unborn children were not cut off. In the second place, the court then proceed to say that "If there be any question in regard to the conclusive effect of a judgment for partition or sale without the aid of the statute, I am satisfied that with such aid there can be none." And they then go on to show that the proceedings under the statute were sufficient to cut off all rights to the land in unborn children. Here the nature of the estate in W and C plays no part whatever, and on this branch of the argument the court chiefly bases the decision. The statement that

¹ 17 N. Y. 210.

W and C have a vested remainder is not called for by the decision, and seems to have been conceded without argument.

§ 476. Next came the cases of *Sheridan v. House*,¹ and *Moore v. Littell*,² the grounds of the decisions in both of which are explained in the opinion of the latter, and have already been quoted. The only question involved was whether the remainders were alienable during the life of the tenant of the precedent estate. And the answer did not depend at all upon the vested or contingent nature of the remainders, for they were alienable whether vested or contingent. The court mention this fact, and after finding that they are vested, they proceed to say; "If the preceding reasoning be wholly fallacious, and be deemed to give interpretation to the statute or construction to the law which is unsound, I am wholly unable to see how the result to the present appellants would be different." And they then go on to show conclusively that the remainders, though contingent, were alienable. Inasmuch, therefore, as they were alienable whether vested or contingent, the discussion of the question whether in reality they were contingent or vested was wholly apart from the decision of the case and cannot be looked on as binding. Three of the judges recorded their dissent from the doctrine that the remainders were vested.³

§ 477. As to the next case, *House v. Jackson*,⁴ the question was whether, if one of the remaindermen also obtained the life estate of John, the union of the two would give him an estate of inheritance in possession, such that his wife's dower right would then attach dur-

¹ 4 Abb. Ct. App. Dec. 218.

² 41 N. Y. 66.

³ See also 6 Abb. Law J. 361.

⁴ 50 N. Y. 161.

ing the life of John. This would not be the result unless the remainder were a vested one. The court sustained the wife's dower right, but they did not examine anew the question whether the remainder was vested. They only say on this point, "*Moore v. Littell* holds the estate of the son, prior to the death of the father to be a vested remainder." The same will and the same persons were under consideration, as in *Moore v. Littell*.

§ 478. Having now examined the cases supporting the view that the revision effected a change in the common law distinction between the terms vested and contingent, we will take up the leading authorities that support the opposite view, and will consider first those going to show that no such change was intended, and secondly those going to show that no such change has in fact been effected.

§ 479. (1) The Revisers, in their Notes, nowhere suggest any intention of drawing a new line of distinction. On the contrary, they make an explanatory statement which shows that they did not intend to do so. For they say: "As where an estate is given to A for life, and if he have any issue living at his death, then to such issue in fee; but if he die without such issue, then to B in fee. Here the remainders to the issue and to B are both contingent, * * *.¹

§ 480. (2) The statute declares the two definitions complementary. A future estate, it says, is either vested or contingent. But under the general rule of *Moore v. Littell*, either the two must overlap, so as to make some estates both vested and contingent, or else, to avoid that result, a strained construction must be put upon the definition of contingent remainders. We will examine these alternatives.

¹ Italics not in original.

§ 481. (a) Chief Justice Savage, in discussing the distinction between vested and contingent remainders,¹ though it was “not a controlling fact in the case” and “did not determine the rights of the parties,” takes the view afterwards supported by Judge Woodruff, and says: “By the statute definition this is a vested remainder, because there are persons in being who would have an immediate right to the possession upon the ceasing of the precedent estate, that is, there are persons in being who would take the possession of the estate were the precedent estate now to cease. Should the twelve nephews and nieces all die this day, there are persons now in being who would be entitled to the remainder under the devise. This remainder is also contingent, according to the statute definition,—the event upon which it is limited to take effect is certain, to wit, the death of the twelve nephews and nieces; but the persons who are to take are uncertain, depending upon the fact of their being in existence at the death of the last of the twelve.” Apart from the particular remainder in that case which gave rise to these remarks, it is evident that wherever, under the application of the rule in *Moore v. Littel*, a contingent remainder would be turned into a vested remainder, it must also remain contingent. For the peculiar feature of this rule is called out only in cases where it is uncertain who (if any one) will ultimately take in possession, but certain who would take if the precedent estate were to terminate just now. This certainty for the present moment satisfies this rule and makes the remainder vested; but the accompanying uncertainty who (if any one) will take in possession if vesting is deferred,—this uncertainty satisfies the statutory definition of contingent remainders, and makes it contingent. But it is hardly

¹ *Coster v. Lorillard*, 14 Wend. 265, 302, 310, 311.

to be supposed that the Legislature intended the definitions to overlap in this way, especially in view of the express provision that future estates are either vested or contingent.

§ 482. (b) The other alternative is to put what appears to be a strained construction upon the statutory definition of contingent remainders. It says that a remainder is contingent "while the person to whom * * * it is limited to take effect, remains uncertain." It is suggested, in support of the rule of *Moore v. Littel*, that this definition does not refer to a case where the persons in whom the remainder would now vest, if the precedent estate were now to terminate, are certain, even though it is uncertain who will really take if its termination be postponed to the future. According to this view the statute is to be read as if it said "while the person in whom it would take effect if the precedent estate were now to terminate, is uncertain." This appears to be utterly at variance with the actual form of expression employed. Great light is thrown on this point, and on our whole subject of discussion, by the fact that while the statutory definition of vested remainders—when taken by itself, disconnected from the context and from its history—is, perhaps, grammatically open to two constructions, the statutory definition of contingent remainders is practically identical with that laid down by Blackstone:

Blackstone, 2 Comm. 169.

"Contingent * * * remainders are where the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event."

Real Property Law, § 40.

A remainder "is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

§ 483. The Revised Statutes themselves employ the term "contingent remainder" in a sense directly opposed to that of the rule in *Moore v. Littel*. For 1 R. S. 722, § 4,¹ provides that a remainder in fee, limited on what would have been an estate tail under the early law, shall be valid as a "contingent limitation on a fee" and shall vest in possession, on the death of the first taker, without issue living at the time of such death. Now pending the life of the first taker, if at any given time he had no issue then living, the rule of *Moore v. Littel* would give the ultimate remainderman a remainder vested, subject to defeat. But the statute expressly makes it contingent.

§ 484. (3) The form of definition adopted in the Revision has frequently been employed in substance, both before and since its adoption by the Revisers, as a correct statement of the common law distinction between the terms vested and contingent. Thus Fearne, in describing vested remainders, attributes to them as a distinguishing characteristic the present capacity of taking effect in possession if the possession were to become vacant.² So Challis³ says that "an estate is said, though not vested in possession, to be vested in interest in a given person, when that person would be entitled, by virtue of it, to the actual possession of the lands, if the estate should become the estate in possession, by

¹ Now Real Prop. L., § 32.

² Fearn on Contingent Remainders (10th. ed.), 215-6; also Greenleaf's Cruise, I, 712. Jickling's Analogy, 265; Lalor on Real Property, 66.

³ Real Property, 56.

the determination of all the precedent estates." So, also, Mr. Preston, in his "Abstracts of Title," says,¹ "The criterion and distinguishing feature of a vested remainder is, that it is capable of taking effect in possession immediately, if the particular estates were determined." And Mr. Williams has been charged, by good authority, with introducing into his explanation of common law vested remainders, in his work on Real Property, the peculiarity attributed to the New York statute,² although nothing, of course, can be more certain than that Mr. Williams intended to state the common law rule with perfect accuracy. Chancellor Kent, in his Commentaries,³ adopts as his general and only definition of vested remainders, the definition from the Revised Statutes, and goes on to say: "The definition of a vested remainder in the New York Revised Statutes appears to be accurately and fully expressed."

Mr. Washburn, in his treatise on Real Property,⁴ calls attention in one of his own notes (4th ed.) to the decision in *Moore v. Littel* as a "remarkable" one, "where it was held that a grant to A for life, remainder to his heirs, was a vested remainder. Three, however, of the court held, what is regarded by most other courts as law—that it was a contingent one." The editors of the fifth edition add: "In *Hennessy v. Patterson*,⁵ the case of *Moore v. Littel* is referred to and explained, as in reality deciding only that under the Revised Statutes of New York the interest of the heirs in the contingent remainder was alienable."

But whatever may have been the original purpose, it remains to be considered whether the cases must be

¹ Vol. II, p. 113.

² Judge Holmes' note, 4 Kent, Comm. (12th. Ed.) 203, note.

³ 4 Kent, 202.

⁴ II, p. 229.

⁵ *Infra*, § 486.

taken to have adopted and established the construction advocated in *Moore v. Littel*.

§ 485. *Carmichael v. Carmichael*.¹ Devise to testator's wife for life, and from and after her decease to testator's children who might "then be living." The court held that "the estate does not vest in remainder until her (the widow's) death, and then it vests only in those children who shall be living at the time of her death." ²

§ 486. *Hennesy v. Patterson*.³ Here the testator, after providing for his widow, and for his daughter Margaret for her life, added: "I wish and will, that should my said daughter Margaret die without leaving any issue, then the said property shall be left to my nephew John Foley." The widow died. Margaret and Foley were left surviving. Margaret had no children. During Margaret's life, therefore, Foley was a "human being" who, if Margaret had then died, would at once have taken the future estate in possession. Under the general principle of the rule laid down in *Moore v. Littel*, Foley's estate would have been vested during Margaret's life, and while she had no children. But in order to reach this conclusion it would be again necessary to disregard the fact that the future estate was given to him only in connection with, and upon, the death of Margaret without issue. Here the common law distinction, and the distinction in *Moore v. Littel* were in direct conflict, and the court follow the former, and hold the future estate in Foley contingent until it should be seen whether Margaret died without issue. Foley died first, and his right to the contingent future

¹ 1 Abb. Ct. App. Dec. 309, 4 Keyes, 346.

² See also *In re Ryder*, 11 Pal. 185; and *People's Trust Co. v. Flynn*, 188 N. Y. 385, 394.

³ 85 N. Y. 91.

estate, not depending on the continuance of his personal life for its existence, descended to his heirs as such, and, upon Margaret's death without issue, vested in them in possession. And the court say: “* * * the rule stated in *Moore v. Littel* by Judge Woodruff, that where the same event in this case the death of Margaret, [without issue], at the same time, *eo instanti*, terminated the precedent estate, and settled the contingency, the remainder was vested, * * * was said of a remainder to the heirs of one living, and we think does not fairly apply to the case before us. And besides, the doctrine was not assented to by three of the judges, and the case was really decided upon the ground * * * that the remainder was contingent, but nevertheless an expectant estate, as defined by the Revised Statutes, and, as such, alienable.”¹

§ 487. In the case just discussed, it will be noticed that the facts came exactly within the terms of the general rule laid down by Judge Woodruff, namely, there was a person in existence whom one could point to and say, “there is a man, or there is a woman, who, if the precedent, or the intermediate, estate were now to terminate, would at once take the remainder in possession.” But the court hold, in *Hennessy v. Patterson*, that that was not enough. It is true that in *Moore v. Littel*,² the relation borne by the remainderman to the life tenant was not the same as that borne, in *Hennessy v. Patterson*,³ by the future tenant to the person upon whose life the precedent estate depended. In the former case the death of John Jackson would have a double effect, terminating the precedent estate and also imparting to his then living children the required capac-

¹ See *Griffin v. Shepard*, 124 N. Y. 70, 76; *Peterson v. DeBaun*, 36 App. Div. 259.

² 41 N. Y. 66.

³ 85 N. Y. 91.

ity as his "heirs." In the other case, however, the existence of a collateral contingency which must happen before vesting, consisted not in the present lack of the required capacity in Foley, for he was specially identified by name in the will. It consisted, instead, in the possible death without issue of a life tenant now alive and childless.

§ 488. There are these distinctions between the facts of the two cases. But these distinctions were not such as to create, at the common law, any difference in the treatment of the two cases; and the statutory definitions contain nothing to suggest one construction in the one case and another in the other. Nor did Judge Woodruff hold that the particular relationship existing in *Moore v. Littel* between the life-tenant and the remainderman created a situation calling for any different construction of the statutory definitions from that applicable to all cases whatever. It is also true that the event upon which vesting in possession was conditioned in the former case, the death of John, was one certain to happen; while in the latter case the event,—the death of Margaret without issue,—was one which might or might not happen. But the court, in *Hennessy v. Patterson*,¹ did not allude to this distinction, or base any assertion of difference on it. The statute lays down a general distinction between vested and contingent estates, and whichever meaning we give to it is applicable to all cases. If it is to be taken literally, as in *Moore v. Littel*, then its literal meaning appears equally applicable in both the cases cited. If such literal meaning is not given it in the *Hennessy* case, it appears to be inapplicable anywhere. The Court of Appeals, in a case where there was a man who could be pointed out as certain to take the future estate in

¹ 85 N. Y. 91.

possession if the intermediate estate should now terminate, holds that nevertheless the future estate is not vested but contingent. And though it calls attention to a distinction between the case in hand and the Moore case it wholly discredits the authority of the latter on the point under discussion, not only by removing the entire foundation on which it is based, but by calling attention to the fact that the Moore case really decided that the remainder was contingent.¹

§ 489. *Hall v. La France Fire Engine Co.*² Grant to A for life, "and at her death to the heir or heirs of her body her surviving." When the deed was delivered, A had one child living. Under Judge Woodruff's definition the remainder would have vested in that child, subject to being divested by its death during A's life. Instead, the court held that it did not vest at all, but was

¹ It has apparently been thought that *Purdy v. Hayt*, 92 N. Y. 446, had some bearing on the question under discussion. Gray, *Perpetuities*, § 107, note 4. The facts in that case showed three successive life estates to J, C and E, followed by a remainder to such children as E, the third life-tenant, might leave surviving her. Under the statute concerning successive life-estates, Chap. VI, the estate to E was cut off, and the question was whether the remainder to E's children could be accelerated and take effect in possession at the end of the second life-estate. Now the answer depended on whether the ultimate remainder was vested or contingent; and it was found to be contingent. The case might at first sight appear to be an authority in line with *Hennessy v. Patterson*. But it is to be noticed in the first place that there was nothing to show that E had any children, until after the close of the second life-estate. So that absence of remaindermen at that time would necessarily have rendered the ultimate remainder contingent, even if there had been no other cause. In the second place, inasmuch as the life-estate to E had been cut off, her death thereby lost all connection with the duration or termination of the life estates. So that if J and C had both died, and thus terminated the precedent estate, any children of E then living could not have taken their remainder in possession. Her death constituted a purely collateral condition precedent, for the happening of which her children, had she had any, would have been obliged, under the terms of the instrument, to wait, even though the precedent estate had terminated. The case is thus seen to have no bearing on the rule in *Moore v. Littell*.

² 158 N. Y. 570.

contingent, because the form of grant to such of the heirs of her body as should survive her, placed a contingency upon the remainder.

§ 490. *Matter of Crane*.¹ Bequest in trust for testator's wife, for life, and upon her death a division among designated brothers and sisters and a niece (or in trust for certain of them), and if any should die before the widow's death, then his share to be paid to others. It was held that the gift to the brothers and sisters and the niece, was contingent, and not vested subject to being divested. And yet there were at any given time persons in being in whom the property would have vested in possession if the widow had then died.

§ 491. *People's Trust Co. v. Flynn*.² Devise in trust for two designated lives, and "upon the death" of those two persons, a devise in remainder to several designated persons in equal shares. It was held that the remainder in the shares did not vest in the respective designated remaindermen, pending the trust, but continued contingent, although there were at any given time persons in being who if the precedent estate were to cease by the falling in of the two lives, would be at once entitled to take, in possession, under the will.

§ 492. *Cushman v. Cushman*.³ Bequest in trust to pay the income to testator's three sons. If certain future events should be decided, in a specified manner, to have occurred, in respect to any given son, the trustees were empowered to thereupon pay over his share to him, thus ending the trust estate therein, but if one of the sons died before such decision, then there was a gift over to one Paul. It was held that the future gift

¹ 164 N. Y. 71.

² 188 N. Y. 385, 394.

³ 116 App. Div. 763, aff'd 191 N. Y. 505.

to the son in question was contingent upon a favorable future decision, and that the alternative gift over to Paul was contingent upon the death of the son before such a decision. But Paul was, under Judge Woodruff's rule, a person in being who, no decision having been made, was at any given time ready to take the share in possession if the prior trust estate therein were to be then ended by the death of testator's son.

§ 493. *Matter of Wilcox*.¹ Bequest in trust for testator's daughter Frances for life, remainder to her issue in equal shares, subject to being divested as to each by death before attaining majority, and in case Frances should leave no issue which should attain majority then (among other provisions) a share to C. In view of the identity of the principles involved, the court found it convenient to discuss the case on the same basis as if real property had been involved, and referred to the statutes relating to real property. Now Frances died, leaving no issue. It became necessary, however, in determining the validity of the testamentary provisions, to ascertain what estate her issue would have taken if she had left issue, and what estate or interest in that event, might have been taken by C. It was accordingly held that the share of each of the issue would have been vested subject, for one thing, to the gift over to C in case of the death of all the issue during minority, and as C, under those circumstances, would have been a person in whom the gift, if otherwise valid, would have vested immediately in case of the death of all the issue during minority, his interest would, under Judge Woodruff's rule, also be vested. The court held, under established principles, that the remainder to C was contingent, and cited *Hennessy v. Patterson*, *supra*. The point thus passed upon was directly in issue, and the

¹ 194 N. Y. 288.

decision turned on the invalidity of the attempted remainder to C because it might have been contingent, during a term not duly measured. The description by the court of the gifts to C as "remainders," has been criticised on the ground that the gifts to the issue of Frances were in fee and that the succeeding ultimate gifts are in derogation of them, and so are not remainders at all. As a matter of common law this is true. But by Real Property Law, § 50, a fee may now be limited on a fee, on a contingency which, if it should occur, must happen within the "statutory period;" and by § 53, "A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; * * * ." The estate in question, therefore, described in terms of real property, was a true modern remainder.

§ 494. *Robinson v Martin*.¹ Devise and bequest in trust for the life of A, the son of testatrix, and upon his death to her "unmarried daughters." At the making of the will and at her death, five of her daughters were unmarried. Thereafter and during the life of A, three of these daughters married, and thus at A's death there were two "unmarried daughters." The question was whether the remainder was given to those who answered to the description at testator's death, or to those who answered to it at A's death. It was held that the latter were intended. It seems to have been the view of the majority of the court that pending A's life the remainder, instead of being vested subject to defeasance, was contingent. "I do not think there was any vesting of the remainder in the son's share in the daughters unmarried at the death of the testatrix."² And yet pending A's life there were persons in being who, if A had

¹ 200 N. Y. 159.

² Page 167.

then died, would have taken the estate, and under the general principle laid down in *Moore v. Littell*, the remainder would necessarily have been vested subject to being divested.

§ 495. In addition to the cases just discussed, there are numerous decisions, involving the same question as *Moore v. Littell*,¹ though on other forms of limitations, which are inconsistent with the general theory of statutory construction there announced.²

§ 496. It is true, as to some of the cases above cited, that the issues before the court did not render it essential to decide whether the given remainder was contingent, or was defeasibly vested,⁴ as the net result would have been the same in either view.⁵ And this also is true of *Moore v. Littell*.⁶

§ 497. From the cases cited, it is clear that the general rule of *Moore v. Littell* cannot be relied on as the clue for guidance through the labyrinth. The most that could be said for it is, that it has established an arbitrary meaning which must be applied to the particular form of a grant or devise "to A for life, remainder to his heirs." Beyond that, it is impossible to reconcile

¹ 41 N. Y. 66.

² *McGillis v. McGillis*, 154 N. Y. 532, 540; *Roosa v. Harrington*, 171 N. Y. 341, 353; *March v. March*, 186 N. Y. 99; *Lewisohn v. Henry*, 179 N. Y. 352; *Paget v. Melcher*, 156 N. Y. 399; *Hillen v. Iselin*, 144 N. Y. 365, 376; *Matter of Baer*, 147 N. Y. 344, 348; *Delafield v. Shipman*, 103 N. Y. 463, 467; see the discussion in 2 *Reeves on Real Property*, 1156; *I Columbia Law Review*, 279, 347; *IX Columbia Law Review*, 587, 697.

³ *Matter of Baer*, 147 N. Y. 344.

⁴ *Denison v. Denison*, 96 App. Div. 418, 422, aff'd 183 N. Y. 505.

⁵ *Matter of Smith*, 131 N. Y. 239, 247; *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127, 132-3; *Paget v. Melcher*, 156 N. Y. 399; *Bisson v. W. S. R. R. Co.*, 143 N. Y. 125; *Teed v. Morton*, 60 N. Y. 502; *Griffin v. Shepard*, 124 N. Y. 70, 76.

⁶ 41 N. Y. 66; *Dougherty v. Thompson*, 167 N. Y. 472; *Livingston v. Greene*, 52 N. Y. 118. See § 152.

the decisions with that general principle, as relating to every case where there is a "human being," however described, who would as a matter of fact take in possession under the instrument if the precedent estate were now to cease. There is no such arbitrary rule.¹ The principle that the intent, in the sense already discussed, is controlling, and may be duly indicated by employing terms of description which will not apply to any one until a future time, still exists. Indeed, even as to the very phrase dealt with in *Moore v. Littel*, it is difficult to see how the courts could fasten an arbitrary meaning on it irrespective even of a duly indicated intent to the contrary, under the statute, as well as their own established principles, requiring them to give effect to the duly indicated intent. "Where, upon inspection of the will and upon a consideration of relevant facts and circumstances, an intent is apparent, all rules to the contrary must yield; provided that intent does not offend against public policy, or some positive rule of law."²

§ 498. The rule of *Moore v. Littel*, in so far as it has any vitality at all, should be, and it is believed that the cited authorities show that it now is, treated as strictly confined, at the best, to the exact form of words there in question, and even as to that form is restricted to cases where there is no other indication whatever of intent, outside of the form itself. Apart from that rule, however, the opinion of Judge Woodruff furnishes valuable material on various points.

§ 499. And the general adherence to the common law

¹ *Carmichael v. Carmichael*, 1 Abb. Ct. App. Dec. 309; *Hennessy v. Patterson*, 85 N. Y. 91; *Hall v. LaFrance Fire Engine Co.*, 158 N. Y. 570; *Matter of Crane*, 164 N. Y. 71; *Cushman v. Cushman*, 116 App. Div. 763, *aff'd* 191 N. Y. 505; *People's Trust Co. v. Flynn*, 188 N. Y. 385, 394; *Matter of Wilcox*, 194 N. Y. 288; and other cases above cited.

² *Robinson v. Martin*, 200 N. Y. 159, 164.

basis of distinction is often shown in the application of further rules, adopted as an aid in ascertaining the intent, and frequently resorted to in questions relating to both real,¹ as well as personal property. For a gift may be immediate, and only the time of enjoyment postponed, or it may be itself future or contingent, depending, as a condition precedent, upon the arrival of the beneficiary at a given age, or surviving some other person, or the like.²

§ 500. Thus, if there is no gift but by a direction to executors or trustees to divide, pay or convey at a future time, the gift is contingent.³ In such a case it is said that futurity is annexed to the substance of the gift.⁴

§ 501. But this rule applies only where, beyond the direction for future division, there are no words and no provisions which import a present or vested gift, or indicate such an intent,⁵ and is confined within the limits of its express terms.⁶ And if, in addition to the

¹ *Paget v. Melcher*, 156 N. Y. 399; *Matter of Baer*, 147 N. Y. 344; *McGillis v. McGillis*, 154 N. Y. 532, 540; *Miller v. Gilbert*, 144 N. Y. 68; *Matter of Seaman*, 147 N. Y. 69, 74.

² *Everitt v. Everitt*, 29 N. Y. 39, 67.

³ *Shipman v. Rollins*, 98 N. Y. 311, 327; *Smith v. Edwards*, 88 N. Y. 92; *Greenland v. Waddell*, 116 N. Y. 234, 244; *Delafield v. Shipman*, 103 N. Y. 463; *Drake v. Pell*, 4 Edw. Ch. 251, 268; *Leake v. Robinson*, 2 *Merivale*, 363, 385 *et seq.*; *Delaney v. McCormick*, 88 N. Y. 174, 183; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 99; *Matter of Baer*, 147 N. Y. 344; *Lewisohn v. Henry*, 179 N. Y. 352, 362; *McGillis v. McGillis*, 154 N. Y. 532, 541; *Rudd v. Cornell*, 171 N. Y. 114, 122; *Clark v. Cammann*, 160 N. Y. 315, 327; *Dougherty v. Thompson*, 167 N. Y. 472, 482; *Schlereth v. Schlereth*, 173 N. Y. 444, 449; *Matter of Crane*, 164 N. Y. 71.

⁴ *Everitt v. Everitt*, 29 N. Y. 39, 75; *Clark v. Cammann*, 160 N. Y. 315, 327.

⁵ *Manice v. Manice*, 43 N. Y. 303, 369; *Warner v. Durant*, 76 N. Y. 133, 136; see *Smith v. Edwards*, 88 N. Y. 92, 105 *et seq.*; *Goebel v. Wolf*, 113 N. Y. 405, 412 *et seq.*

⁶ *Smith v. Edwards*, 88 N. Y. 92, 105; *Steinway v. Steinway*, 163 N. Y. 183, 200; *Roosa v. Harrington*, 171 N. Y. 341, 351.

direction to executors or trustees to pay over, divide or distribute, there are also words importing a gift, the general rule does not govern.¹

§ 502. And where the gift is absolute, and only the time of payment or conveyance postponed, here time, not being of the substance of the gift, but relating to the payment or conveyance, does not suspend the gift, but merely defers possession.²

§ 503. Under this latter rule there are two classes of cases to be considered. In the first the gift is vested as a remainder and is preceded by a temporary gift in the same property to another person, either beneficially or in trust. Here the actual payment or division is postponed merely because in the meantime the preceding legatee or devisee is entitled to the income or the enjoyment; in such cases there is no difficulty in recognizing the vested character of the legacy or devise, in spite of the postponement of possession.³ The rule on this subject has been stated as follows: "If the postponement

¹ *Manice v. Manice*, 43 N. Y. 303, 369; *Traver v. Schell*, 20 N. Y. 89; *Matter of Crane*, 164 N. Y. 71, 77.

² *Goebel v. Wolf*, 113 N. Y. 405, 412; *Savage v. Burnham*, 17 N. Y. 561, 575; *Bliven v. Seymour*, 88 N. Y. 469, 478; *Dougherty v. Thompson*, 167 N. Y. 472, 493; *Matter of Gardner*, 140 N. Y. 122, 129; *Matter of Seebeck*, 140 N. Y. 241, 246; *Bowditch v. Ayrault*, 138 N. Y. 223; *Matter of Crane*, 164 N. Y. 71; *Schlereth v. Schlereth*, 173 N. Y. 444; *Matter of Tienken*, 131 N. Y. 391; *Matter of Brown*, 154 N. Y. 313, 325; *Dimmick v. Patterson*, 142 N. Y. 322; *Roosa v. Harrington*, 171 N. Y. 341; *Matter of Brandreth*, 169 N. Y. 437; *Haug v. Schumacher*, 166 N. Y. 506; *Miller v. Gilbert*, 144 N. Y. 68, 73; *Matter of Seaman*, 147 N. Y. 69, 74; *U. S. Trust Co. v. Wheeler*, 73 App. Div. 289, aff'd 173 N. Y. 631; *Matter of Murphy*, 144 N. Y. 557. See *Steinway v. Steinway*, 163 N. Y. 183, 198.

³ *Everitt v. Everitt*, 29 N. Y. 39, 75; *Goebel v. Wolf*, 113 N. Y. 405, 412; *Gilman v. Reddington*, 24 N. Y. 9, 18; *Matter of Mahan*, 98 N. Y. 372, 376; *Torrey v. Shaw*, 3 Edw. Ch. 355, 356; *Savage v. Burnham*, 17 N. Y. 561, 575; *Meyer v. Cahen*, 111 N. Y. 270; *Wheeler v. Ruthven*, 74 N. Y. 428; *Palmer v. Dunham*, 52 Hun, 468, aff'd 125 N. Y. 68; *supra* § 127.

of the payment is for the purpose of letting in an intermediate estate, then the interest shall be deemed vested at the death of the testator and the class of legatees is to be determined as of that date, for futurity is not annexed to the substance of the gift.”¹

§ 504. In the other class of cases the postponement is to occur after the time when the gift in question is to take effect in enjoyment, and consists merely in postponement of the actual possession.²

§ 505. “Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words ‘heirs’ or ‘issue’ shall be construed to mean heirs or issue living at the death of the person named as ancestor.”³

§ 506. Where there is a devise in fee,⁴ with a devise over in case of death, or death without issue, or childless, either to survivors or to substituted devisees,⁵ the “death” and “survivorship” referred to are presumably such as occur during the life of the testator only.⁶

¹ *Matter of Crane*, 164 N. Y. 71, 76; *Haug v. Schumacher*, 166 N. Y. 506; *Matter of Embree*, 9 App. Div. 602, *aff'd* 154 N. Y. 778.

² Authorities on this latter point are cited *supra* §§ 126-127.

³ *Real Prop. L.* § 48; *Ferris v. Gibson*, 4 Edw. Ch. 707; *Anderson v. Jackson* 16 Johns. 382; *Patterson v. Ellis*, 11 Wend. 259; *Miller v. Macomb*, 26 Wend. 229; *Cutter v. Doughty*, 7 Hill, 305, 307; *Matter of Moore*, 152 N. Y. 602; 2 *Reeves on Real Property*, § 955. Effect of intent. *Miller v. McBlain*, 98 N. Y. 517; *Matter of Truslow*, 140 N. Y. 599.

⁴ *Lyons v. Ostrander*, 167 N. Y. 135, 140; *Mullarky v. Sullivan*, 136 N. Y. 227; *Fowler v. Ingersoll*, 127 N. Y. 472, 478; *Vanderzee v. Slingerland*, 103 N. Y. 47; *Matter of Baer*, 147 N. Y. 344; *Matter of N. Y. L. & W. R. R. Co.*, 105 N. Y. 89, 93.

⁵ Cases above cited.

⁶ *Kelly v. Kelly*, 61 N. Y. 47, 50; *Stevenson v. Lesley*, 70 N. Y. 512, 515; *Livingston v. Greene*, 52 N. Y. 118; *Moore v. Lyons*, 25 Wend. 119, 123; first two paragraphs of opinion in *Matter of N. Y. L. & W. R. R. Co.*, 105 N. Y. 89, 92; *Doe dem. Long v. Prigg*, 8 B. & C. 231; *VanCott v. Prentice*, 104 N. Y. 45; *Quackenbos v. Kingsland*, 102 N. Y. 128; *Embury v. Sheldon*, 68 N. Y. 227; *Stokes v. Weston*, 112 N. Y. 433, 436; *Matter*

But the intent controls.¹

§ 507. The rule on this subject is sometimes stated so that instead of including the case of death, simply, it seems to exclude it, thus: "Where the devise or bequest over to third persons is not dependent upon the event of death simply, but upon death without issue," etc.² But the earlier and still the usual form of statement includes, and even lays special emphasis on, this very instance of death simply, and relies on it for the best explanation of the origin of the rule.³ The general rule does not cover cases where some period other than that of testator's lifetime is provided by the will as the time during which a death may occur and still have the result of causing a devolution of title. Thus, where there is a devise to A for life, and upon his death then to B. in fee, the death referred to is not confined to such as may occur during testator's lifetime.⁴ For provisions having a bearing on forms of dispositions not infrequently occurring in connection with questions here

of *Tompkins*, 154 N. Y. 634; *Matter of Disney*, 190 N. Y. 128; *Williams v. Boul*, 101 App. Div. 593, aff'd 184 N. Y. 605; *Benson v. Corbin*, 145 N. Y. 351; *Matter of Russell*, 168 N. Y. 169; *Washbon v. Cope*, 144 N. Y. 287; *Matter of Tienken*, 131 N. Y. 391; *Smith v. Hull*, 97 App. Div. 228, aff'd 184 N. Y. 534; *Matter of Cramer*, 170 N. Y. 271; *Nelson v. Russell*, 135 N. Y. 137.

¹ *Vanderzee v. Slingerland*, 103 N. Y. 47, 56; *Kelso v. Lorillard*, 85 N. Y. 177; *Matter of Denton*, 137 N. Y. 428; *Gibson v. Walker*, 20 N. Y. 476, 483; *Davis v. Davis*, 118 N. Y. 411; *Guernsey v. Guernsey*, 36 N. Y. 267; *Matter of Maben*, 131 N. Y. 255; *Matter of N. Y. L. & W. R. R. Co.*, 105 N. Y. 89, 96; *Nellis v. Nellis*, 99 N. Y. 505, 514; *Miller v. McBlain*, 98 N. Y. 517, 521, where see also respondent's points, p. 520; *Buel v. Southwick*, 70 N. Y. 581; *Austin v. Oakes*, 117 N. Y. 577; *Williams v. Jones*, 166 N. Y. 522, 539; *Colby v. Doty*, 158 N. Y. 323.

² *Washbon v. Cope*, 144 N. Y. 287, 297.

³ *Vanderzee v. Slingerland*, 103 N. Y. 47, 53, 55; *Matter of N. Y. L. & W. R. R. Co.*, 105 N. Y. 89; *Stokes v. Weston*, 142 N. Y. 433, 436-7; *Kelly v. Kelly*, 61 N. Y. 47.

⁴ *Chapman v. Moulton*, 8 App. Div. 64; *Matter of Denton*, 137 N. Y. 428.

discussed, see the rule and the statutory provisions in regard to lapse of legacies or devises,¹ and the statute abolishing estates tail, and affecting the remainders.²

§ 508. In bequests of personal property, words of survivorship are to be referred to the time for distribution and enjoyment.³ But this may not represent so much any difference due merely to the kind of property, as the fact that in the case referred to a period other than testator's death is set forth as the date to which words of survivorship shall refer. The rule applies only where no contrary intent appears.⁴ This proposition must also be read in the light of the rule that the law favors vesting at as early a time as possible, and the rules for determining whether or not futurity is annexed to the substance of a gift.

§ 509. Authority may be found for the proposition that so long as possession may be defeated, a gift, if of personal property, is said to be contingent, even where, if the property were realty, it would be regarded as vested subject to being divested.⁵ At most, however, the distinction only forms the basis for a certain presumption. A future interest in personal property is not necessarily contingent because defeasible. It may, like a future estate in real property, be vested subject to

¹Decedent Estate Law, § 29; *Langley v. Westchester Trust Co.*, 180 N. Y. 326; *Matter of Tienken*, 131 N. Y. 391, 403; *Matter of Wells*, 113 N. Y. 396.

²Real Prop. L. § 32; *Buel v. Southwick*, 70 N. Y. 581, 585; *Goodell v. Hibbard*, 32 Mich. 47; *Nellis v. Nellis*, 99 N. Y. 505, 511.

³*Teed v. Morton*, 60 N. Y. 502, 506; *Vincent v. Newhouse*, 83 N. Y. 505, 511; *Matter of Mahan*, 98 N. Y. 372, 376; *Delaney v. McCormick*, 88 N. Y. 174, 183; *Vanderzee v. Slingerland*, 103 N. Y. 47, 55; *Willetts v. Willetts*, 20 Abb. N. C. 471, and s. c. 103 N. Y. 650.

⁴*Id.*

⁵See Note 18 Abb. N. C., p. 298; *Henderson v. Henderson*, 113 N. Y. 1, 14.

being divested.¹ Indeed, the rule that the law favors vesting and as early as possible, applies to legacies as well as devises. The final decision in given cases is based on the intent.²

§ 510. On the subject of present or postponed vesting of legacies, the authorities may also be arranged in illustrative groups according as they relate to the reason why the payment of a legacy is postponed, as, for the "convenience of the estate;"³ or the benefit of the legatee;⁴ or to the presence or absence of provisions relating to payment of interest pending payment of principal;⁵ or to a direction to divide all income among legatees as constituting an out and out gift of prin-

¹ U. S. Trust Co. v. Wheeler, 73 App. Div. 289, aff'd 173 N. Y. 631; Dougherty v. Thompson, 167 N. Y. 472, 487; Matter of Brandreth, 169 N. Y. 437, 442; Matter of Green, 153 N. Y. 223; Matter of Seaman, 147 N. Y. 69, 74. See also the cases relating to gifts to a "class."

² Bowditch v. Ayrault, 138 N. Y. 222 and 662.

Cases of death before division, as relating to time appointed for division or sale, or time of actual division or sale. Manice v. Manice, 43 N. Y. 303, 368, 373; Finley v. Bent, 95 N. Y. 364; Henderson v. Henderson, 113 N. Y. 1, 13; Underwood v. Curtis, 127 N. Y. 523. Civil death. Avery v. Everett, 110 N. Y. 317. Death, when presumed, Barson v. Mulligan, 191 N. Y. 306, 324.

³ Robert v. Corning, 89 N. Y. 225, 240, 241; Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, 213 (see Burke v. Valentine, 52 Barb. 412, 425.)

⁴ Vernon v. Vernon, 53 N. Y. 351.

⁵ Quade v. Bertsch, 65 App. Div. 600, aff'd 173 N. Y. 615; Warner v. Durant, 76 N. Y. 133; Vanderpoel v. Loew, 112 N. Y. 167, 181; Robert v. Corning, 89 N. Y. 225, 240; Patterson v. Ellis, 11 Wend. 259; Tucker v. Bishop, 16 N. Y. 402, 405; Smith v. Edwards, 88 N. Y. 92, 106; Matter of Seebeck, 140 N. Y. 241; Zartman v. Ditmars, 37 App. Div. 173; Locke v. F. L. & T. Co., 140 N. Y. 135, 146; Steinway v. Steinway, 163 N. Y. 183, 198; Delafield v. Shipman, 103 N. Y. 463, 467; Matter of Mahan, 98 N. Y. 372; Phelps' Ex'r v. Pond, 23 N. Y. 69, 81-2; Matter of Smith, 131 N. Y. 239; Hatch v. Bassett, 52 N. Y. 359; Clancy v. O'Gara, 4 Abb. N. C. 258, 273; Manice v. Manice, 43 N. Y. 303, 353, 365; Dubois v. Ray, 35 N. Y. 162, 170; Lovett v. Gillender, 35 N. Y. 617, 621; Thomas, Estates Created by Will, II, pp. 1603-1605.

cipal;¹ or to a gift over of corpus;² or to gift of a fund not to come into existence as such until a future date.³

¹ Hatch v. Bassett, 52 N. Y. 359.

² Matter of Smith, 131 N. Y. 239; Matter of Tienken, 131 N. Y. 391.

³ Shipman v. Rollins, 98 N. Y. 311, 325; Delaney v. McCormick, 88 N. Y. 174, 183; Vincent v. Newhouse, 83 N. Y. 505, 511; Manice v. Manice, 43 N. Y. 303, 368-9. Also, postponement of legacies charged on land; Marsh v. Wheeler, 2 Edw. Ch. 156, 163; Loder v. Hatfield, 71 N. Y. 92, 100; Snell v. Tuttle, 44 Hun, 324, 329; or personal property. Wheeler v. Lester, 1 Bradf. 213.

CHAPTER XII.

CONFLICT OF LAWS.

§ 511. The validity of a disposition of real property depends on the law of the place where the land lies.¹ The validity of a disposition of personal property depends on the law of the owner's domicile.² The following statements deal with the particular classes of disposition which have in fact proved of special interest in connection with the main topics of the present volume.

§ 512. In the leading case of *Chamberlain v. Chamberlain*,³ the following propositions were laid down:

§ 513. (a) "The law of the testator's domicile controls, as to the formal requisites essential to the validity

¹ Decedent Estate Law, § 47; *Kerr v. Moon*, 9 Wheat. 565, 570; *Lee v. Tower*, 124 N. Y. 370; *Mount v. Tuttle*, 183 N. Y. 358, 365; *Trowbridge v. Metcalf*, 5 App. Div. 318, 158 N. Y. 682. See *St. John v. Andrews Institute*, 191 N. Y. 254, 267; *White v. Howard*, 46 N. Y. 144; *Knox v. Jones*, 47 N. Y. 389; *Hobson v. Hale*, 95 N. Y. 588; *Shields v. Klopff*, 70 Wis. 19; *Ford v. Ford*, 80 Mich. 42; and cases below cited.

² Decedent Estate Law, § 47; *Dammert v. Osborn*, 141 N. Y. 564, 566; *Ockerman v. Cross*, 54 N. Y. 29. For qualifications and exceptions, see for example Decedent Estate Law, § 47; *Warner v. Jaffray*, 96 N. Y. 248, 254; *Dearing v. McKimmon D. & H. Co.*, 165 N. Y. 78, 87; *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624, 628-9; *Chamberlain v. Chamberlain*, 43 N. Y. 424, 433; *St. John v. Andrews Institute*, 191 N. Y. 254, 267; *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 496, and cases below cited.

Judicial proceedings in another State; jurisdiction; appointment of trustee to execute the trusts declared in a will, involves adjudication that there is a trust. *Smith v. Central Trust Co.*, 154 N. Y. 333. Compare *Matter of Carpenter*, 131 N. Y. 86.

³ 43 N. Y. 424.

of the will as a means of transmitting property, the capacity of the testator, and the construction of the instrument.”¹

§ 514. (b) “If within the *lex domicilii*, a will has all the forms and requisites to pass the title to personality, the validity of particular bequests will depend upon the law of the domicile of the legatee and of the government to which the fund is by the terms of the will to be transmitted for administration.”² In *Cross v. U. S. T. Co.*,³ the opinion, after quoting the foregoing statement from the opinion in *Chamberlain v. Chamberlain*,⁴ says: “When the learned judge said that the validity of a particular bequest would depend upon the law of the domicile of the legatee, he had reference to the capacity of the legatee to take, and that, of course, depended upon the statutes of Pennsylvania. * * * The power to take was no doubt governed by the law of the domicile of the legatee, as neither the will nor the law of the testator’s domicile could confer this power upon a corporation of another State.”⁵

§ 515. (c) “If the legatee, whether a natural or artificial person, and whether he takes in his own right or in trust, is capable, by the law of his domicile, to take the legacy in the capacity and for the purposes for which

¹ *Chamberlain v. Chamberlain*, 43 N. Y. 424, 432; *Hope v. Brewer*, 136 N. Y. 126, 138. See also *Dammert v. Osborn*, 140 N. Y. 30; 141 N. Y. 564; *Cross v. U. S. Trust Co.*, 131 N. Y. 330; *Smith v. Central Trust Co.*, 154 N. Y. 333; *Phelps’ Ex’r. v. Pond*, 23 N. Y. 69, 77; *Bascom v. Albertson*, 34 N. Y. 584.

² *Chamberlain v. Chamberlain*, 43 N. Y. 424, 433; *St. John v. Andrews Institute*, 191 N. Y. 254; *Matter of Sturgis*, 164 N. Y. 485; *Hope v. Brewer*, 136 N. Y. 126; *Matter of Huss*, 126 N. Y. 537. See *Manice v. Manice*, 43 N. Y. 303, 387-8.

³ 131 N. Y. 330, 346.

⁴ 43 N. Y. 424.

⁵ See *Dammert v. Osborn*, 140 N. Y. 30; 141 N. Y. 564; *Matter of Huss*, 126 N. Y. 537.

it is given, and the bequest is in other respects valid, it will be sustained, irrespective of the law of the testator's domicile." ¹

§ 516. (*d*) The rule last above stated is "subject, however, to this qualification, that if the law of the testator's domicile, in terms, forbid bequests for any particular purpose, or in any other way limit the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void everywhere." ²

§ 517. (*e*) "So far as the validity of bequests depends upon the general law and policy of the State affecting property and its acquisition generally, and relating to its accumulation, and a suspension of ownership and the power of alienation, each State is sovereign as to all property within its territory, whether real or personal." ³

§ 518. (*f*) "It is no part of the policy of the State of New York to interdict perpetuities or gifts in mortmain, in Pennsylvania or California. Each State determines those matters according to its own views of policy

¹ Chamberlain v. Chamberlain, 43 N. Y. 424, 433; St. John v. Andrews Institute, 191 N. Y. 254, 267; Matter of Sturgis, 164 N. Y. 485; Hope v. Brewer, 136 N. Y. 126. See Dammert v. Osborn, 140 N. Y. 30; 141 N. Y. 564; Cross v. U. S. Trust Co., 131 N. Y. 330; Matter of Huss, 126 N. Y. 537. A similar rule applies to trust deeds or declarations of trust. Robb v. Washington & Jefferson College, 185 N. Y. 485, 496.

² Chamberlain v. Chamberlain, 43 N. Y. 424, 433. See Dammert v. Osborn, 140 N. Y. 30; 141 N. Y. 564.

³ Chamberlain v. Chamberlain, 43 N. Y. 424, 434. See Dammert v. Osborn, 140 N. Y. 30; 141 N. Y. 564; Hope v. Brewer, 136 N. Y. 126; Cross v. U. S. Trust Co., 131 N. Y. 330. Inapplicability of the New York statute forbidding alienation of beneficial interests under certain trusts, to the case of trusts created and carried out in other States where the common law principles are not shown to have been changed. First Nat. Bank v. Nat. Broadway Bank, 156 N. Y. 459. See Robb v. Washington Jefferson College, 185 N. Y. 485.

or right, and no other State has any interest in the question, and there is no reason why the courts of this State should follow the funds bequeathed to the Centenary Fund Society, to Pennsylvania, to see whether they will be there administered in all respects in strict harmony with our policy and our laws.”¹

§ 519. (g) Whatever may be the law in another State, “a testator domiciled in that State cannot establish by bequests of personalty to citizens or corporations of this State, a charity or trust to be administered here inconsistent with the policy of the laws of this State.” Such was the principle laid down in *Chamberlain v. Chamberlain*.² But “in *Cross v. United States Trust Company*, 131 N. Y. 330, we held that a disposition of personal property by will and in the form of a trust, to be executed in this State, made by a person domiciled in another State, valid at the place of the domicile, was valid here, though the absolute ownership of the property was suspended for a period longer than is permitted by our statute.”³ “The general principle that a disposition of personal property, valid at the domicile of the owner, is valid everywhere, is of universal application. * * * There is no law that forbids gifts to charity here by testators in other countries, or that requires us to reject the gift unless it is made, in all respects, in conformity with our local law. There is no public policy on that subject except what is to be found in the language of the statute”

¹ *Chamberlain v. Chamberlain*, 43 N. Y. 424, 434; *St. John v. Andrews Institute*, 191 N. Y., 254, 267; *Matter of Sturgis*, 164 N. Y. 485; *Hope v. Brewer*, 136 N. Y. 126. See also *Cross v. U. S. Trust Co.*, 131 N. Y. 330; *Dammert v. Osborn*, 140 N. Y. 30; 141 N. Y. 564; *Matter of Huss*, 126 N. Y. 537; *Despard v. Churchill*, 53 N. Y. 192.

² 43 N. Y. 424, 433.

³ *Hope v. Brewer*, 136 N. Y. 126, 139. See *Despard v. Churchill*, 53 N. Y. 192.

(prohibiting suspension of absolute ownership for more than two lives in being.) "When that statute was passed it was not within the legislative purpose to interdict dispositions made in other countries to take effect here. * * * The policy that dictated our statutes against perpetuities and accumulations did not anticipate any danger from abroad."¹

§ 520. "In this case we are asked, virtually, to * * * give active aid and assistance in the enforcement of a trust, which, in a domestic will, would doubtless be void. * * * The objection to this relief, which, under ordinary circumstances might be formidable, has been, we think, greatly obviated, if not entirely removed, by the legislation "creating a corporation to receive the gift for the objects designated in the will, involving an expression of the legislative power that the gift should be received and so administered, thus suspending, or *pro tanto* repealing, all legal obstacles. The legislature had the power to do this, as no title or beneficiary interest had in the meantime vested under the law of the domicile, in heirs, next of kin, or legatees."²

§ 521. "We think that none of the cases referred to hold that a valid disposition of property at the domicile of the owner may be declared void by the tribunals of another country, where the law is different, and the title adjudged to be in another. * * * The fundamental error that pervades all the reasoning of the learned counsel on this subject is to be found in the assumption that the courts of this State can annul a disposition of personal property in a foreign will, valid by the

¹ Dammert v. Osborn, 140 N. Y. 30, 39, 41.

² Dammert v. Osborn, 140 N. Y. 30, 41-42.

In such a case, and under such circumstances, L. 1903, Ch. 701, relating to charitable uses, see *supra*, Chapter VIII, also has an application, though enacted subsequent to the death of the testator. Dammert v. Osborn, 140 N. Y. 30, 41-2. See Despard v. Churchill, 53 N. Y. 192.

law of the domicile, and distribute the property to claimants here, contrary to the terms of such disposition, as interpreted by the law under which it was made. No controlling authority can be found in support of such a proposition. When our courts cannot give effect to testamentary dispositions of property in foreign wills without violating our laws or public policy, the property should be remitted to the jurisdiction of the domicile to the end that it may administer its own laws. But if there is no law or public policy here that forbids the execution of the purpose that the testator had in view, then our courts will give effect to the disposition according to the law under which it was made. We are still of the opinion that the legislature intended to and did remove all these objections, and so changed our laws and public policy, so far as they were ever in the way, with respect to this particular bequest, as to permit, if not require, our courts to give effect to the testator's purpose." ¹

§ 522. (*h*) "A gift by will of a citizen of this State to a charity, or upon a trust to be administered in a sister State, which would be lawful in this State, the domicile of the donor, would not be sustained, if it was not in accordance with the laws of the State in which the fund was to be administered." ² But, "We are of opinion that the validity of a gift or trust under such circumstances depends on the extent to which it is necessary that the administration should be had in the foreign jurisdiction." ³

¹ *Dammert v. Osborn*, 141 N. Y. 564, 568. See *Despard v. Churchill*, 53 N. Y. 192.

² *Chamberlain v. Chamberlain*, 43 N. Y. 424, 433; *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 496-7.

³ *Mount v. Tuttle*, 183 N. Y. 358, 364. See *Dammert v. Osborn*, 140 N. Y. 30; 141 N. Y. 564; *Cross v. U. S. Trust Co.*, 131 N. Y. 330; *Hope v. Brewer*, 136 N. Y. 126; *Despard v. Churchill*, 53 N. Y. 192.

APPENDIX.

Michigan, Minnesota and Wisconsin.

§ 523. In these States the general statutory scheme in relation to suspension of the absolute power of alienation of real property, its nature and test, and the length of its maximum authorized "statutory period," is in most particulars the same or nearly the same, as that of New York, with certain exceptions. The principal statutory provisions and authorities indicating the general lines of the scheme are given in the note below.¹

¹ The statutory references are confined to the general revisions or compilations mentioned below.

Michigan: Compiled Laws 1897, Estates in Real Prop., §§ 8783-8828; Uses and Trusts, §§ 8829-8855; Powers, §§ 8856-8917. *McIrnerly v. Haase*, 163 Mich. 364; *Root v. Snyder*, 161 Mich. 200; *Mandlebaum v. McDonell*, 29 Mich. 78; *Fitz Gerald v. City of Big Rapids*, 123 Mich. 281; *Niles v. Mason*, 126 Mich. 482; *Foster v. Stevens*, 146 Mich. 131; *Farrand v. Petit*, 84 Mich. 671; *St. Amour v. Rivard*, 2 Mich. 294; *Trufant v. Nunneley*, 106 Mich. 554; *Dean v. Mumford*, 102 Mich. 510; *Toms v. Williams*, 41 Mich. 552; *Mulreed v. Clark*, 110 Mich. 229; *Casgrain v. Hammond*, 134 Mich. 419; *Goodell v. Hibbard*, 32 Mich. 47; *Bennett v. Chapin*, 77 Mich. 526; *Downing v. Birney*, 117 Mich. 675; *Hull v. Osborn*, 151 Mich. 8; *Thatcher v. St. Andrews Church*, 37 Mich. 264; *Case v. Green*, 78 Mich. 540; *Ford v. Ford*, 80 Mich. 42; *Cole v. Lee*, 143 Mich. 267; *State v. Holmès*, 115 Mich. 456; *Torpy v. Betts*, 123 Mich. 239; *Meth. Church v. Clark*, 41 Mich. 730; *Paton v. Langley*, 50 Mich. 428; *Defreese v. Lake*, 109 Mich., 415.

Minnesota: Revised Laws, 1905 and Supp. 1909. Estates in Real Property, §§ 3191-3239; Uses and Trusts, §§ 3240-3265; Powers, §§ 3266-3326. *Rong v. Haller*, 109 Minn. 191; *Atwater v. Russell*, 49 Minn. 57; *Simpson v. Cook*, 24 Minn. 180; *In re Tower*, 49 Minn. 371.

§ 524. In all three States, the statutes on suspension relate to real property only. But on the question of how the case of personal property is regulated, the decisions differ.¹ The purposes for which real property trusts may be created are in part as in New York, and in part different in each state.²

§ 525. Illustrative cases on trusts for charity are given below.³

Wisconsin: Wisconsin Statutes (Sanborn & Berryman's Ed., 1898 and Supp. 1899-1906). Estates in Real Property, §§ 2025-2070; Uses and Trusts, §§ 2071-2100 a; Powers, §§ 2101-2158; Will of Harrington, 142 Wis. 447; Saxton v. Webber, 83 Wis. 617; Beurhaus v. Cele, 94 Wis. 617; Hartung v. Witte, 59 Wis. 285; Becker v. Chester, 115 Wis. 90; Eggleston v. Swartz, 129 N. W. Rep. 48; Flaherty v. Adelman, 138 Wis. 120; Goodrich v. Milwaukee, 24 Wis. 422; Ford v. Ford, 70 Wis. 19; Hughes v. Hughes, 91 Wis. 138; Powers v. Powers, 28 Wis. 659; Danforth v. Oshkosh, 119 Wis. 262; In re Estate of Pierce, 56 Wis. 560; Holmes v. Walter, 118 Wis. 409; Bridge v. Ward, 35 Wis. 687; Tyson v. Tyson, 96 Wis. 59. The words "and twenty-one years thereafter" were in 1887 added to the designation of two lives. Becker v. Chester, 115 Wis. 90; Hughes v. Hughes, 91 Wis. 138; In re Will of Kopmeier, 113 Wis. 233; Danforth v. Oshkosh, 119 Wis. 262.

¹In re Tower, 49 Minn. 371; Becker v. Chester, 115 Wis. 90; Holmes v. Walter, 118 Wis. 409; Danforth v. Oshkosh, 119 Wis. 262; Kavanaugh v. Watt, 143 Wis. 90; and see DeWolf v. Lawson, 61 Wis. 469, 474; Webster v. Morris, 66 Wis. 306, 382; Ford v. Ford, 70 Wis. 19; Scott v. West, 63 Wis. 529; Dodge v. Williams, 46 Wis. 70, 95; Palms v. Palms, 68 Mich. 355; Penny v. Croul, 76 Mich. 471; Toms v. Williams, 41 Mich. 552, 569. As to the general principles concerning separation of void from valid parts of a scheme, set forth *supra* Chapter X, see St. Amour v. Rivard, 2 Mich. 294; Dean v. Mumford, 102 Mich. 510; Palms v. Palms, 68 Mich. 355.

²Statutes above cited. Toms v. Williams, 41 Mich. 552; Wilson v. Odell, 58 Mich. 533; Palms v. Palms, 68 Mich. 355; Scott v. West, 63 Wis. 529; Goodrich v. Milwaukee, 24 Wis. 422.

³*Michigan:* Meth. Church v. Clark, 41 Mich. 730; Penny v. Croul, 76 Mich. 471; St. Amour v. Rivard, 2 Mich. 294; FitzGerald v. City of Big Rapids, 123 Mich. 281; Lounsbury v. Trustees, 129 N. W. Rep. 36. *Minnesota:* Notice the change in the statute from its original form, and consult East Norway Lake Church v. Froislie, 37 Minn. 447; Little v. Willford, 31 Minn. 173; Rong v. Haller, 109 Minn. 191;

Atwater v. Russell, 49 Minn. 57; City of Owatonna v. Rosebrock, 88 Minn. 318; German Land Ass'n v. Scholler, 10 Minn. 331; Shanahan v. Kelly, 88 Minn. 202. *Wisconsin*: Maxcy v. Oshkosh, 144 Wis. 238 and cases cited; Kavanaugh v. Watt, 143 Wis. 90; Milwaukee Protestant Home v. Becher, 87 Wis. 409; Webster v. Morris, 66 Wis. 366; Fadness v. Braunborg, 73 Wis. 257; Will of Fuller, 75 Wis. 431; DeWolf v. Lawson, 61 Wis. 469; Dodge v. Williams, 46 Wis. 70; Harrington v. Pier, 105 Wis. 485; Danforth v. Oshkosh, 119 Wis. 262; Gould v. Taylor Orphan Asylum, 46 Wis. 106; Beurhaus v. Cole, 94 Wis. 617; Ruth v. Oberbrunner, 40 Wis. 238; Heiss v. Murphey, 40 Wis. 276.

NOTE.

THE following decisions, published too late for reference in the appropriate places in the text, may here be noted. Rents and profits undisposed of, Penniman v. Howard, 71 Misc. 598; the term "vested contingent" estate, is used in Matter of Whalen, 143 App. Div. 743, 747; liability of vested estate to open and let in, is immaterial if restricted within statutory period, Seitz v. Faversham, 141 App. Div. 903; term of suspension valid if it must cease by the end of two lives in being, Ogilby v. Hickok, 144 App. Div. 61. The term "perpetuities" appears in our statutes in Real Prop. L. § 114 *a* and Pers. Prop. L. § 13 *a*, relating to cemetery trusts.

TABLE OF INDEX TOPICS.

ABSOLUTE.	CONTINGENCY.
ACCUMULATION.	CONTRAVENTION OF TRUST.
ACQUIESCE.	CONVEY.
ADDITIONAL TERM.	CORPORATION.
ALIENABILITY.	COURT.
ALIENS.	COVENANTS.
ALTERNATIVE.	CREATION OF THE ESTATE.
ANALOGY.	CREDITORS' RIGHTS.
ANNUITY.	CY PRES.
APPOINTMENT.	
ASSIGNMENT.	DEATH.
AUTRE VIE.	DEED.
	DEPOSIT.
BAR.	DESIGNATION OF LIVES.
BENEFICIARY.	DESTRUCTIBILITY.
BENEVOLENT.	DISCRETIONARY.
BEQUEST.	DISPOSITION, ABSOLUTE POWER OF.
BIRTH.	
	EASEMENTS.
CEMETERY TRUSTS.	ELECTION.
CESTUI.	EQUITABLE CONVERSION.
CHARGE.	ESCHEAT.
CHARITY.	ESTATE.
CHATELAIN REAL.	ESTOPPEL.
CHILD.	EXCHANGE.
CHILD-BEARING.	EXPECTANT ESTATE.
CLASS.	
COMBINATIONS.	FEE, ESTATE IN.
COMPROMISE.	FORMER ADJUDICATION.
CONDITION.	FUTURE ESTATES.
CONDITIONAL LIMITATION.	
CONFLICT OF LAWS.	GESTATION.
CONSENT.	GROSS, SUM IN.
CONSTRUCTION.	
CONTINGENCIES, SUSPENSION BY.	

HISTORY.	POSSESSION.
HUSBAND.	POSSIBILITY.
	POSTPONEMENT OF VESTING.
ILLEGALITY.	POWER.
IMPERATIVE.	POWERS, SUSPENSION BY.
INFANT.	PRESUMPTIONS.
INDEFINITENESS.	PROMISSORY NOTE.
INTENT.	
INTESTACY.	RELEASE.
INSURANCE POLICY.	RELIGIOUS.
ISSUE.	REMAIN.
	REMAINDERS.
JOINT TENANCY.	RE MOTENESS.
JUDGMENT.	RENEWALS.
	RENTS AND PROFITS.
LACHES.	REPUGNANCY.
LEASES.	RESTRAINTS.
LEGISLATURE.	REVERSION.
LEGACY.	REVOCATION.
LIFE.	RIGHT OF ENTRY.
LIVES IN BEING.	RULE IN SHELLEY'S CASE.
	RULES.
MAJORITY	SEPARABILITY.
MEASURE.	SEPARATE PERIODS.
MERGER.	SHARES.
MICHIGAN.	SPLITTING.
MINNESOTA.	SPRINGING USES.
MINORITY.	STATUTORY PERIOD.
MORTGAGE.	STATUTORY SALES.
MUST.	SUBORDINATE MEASURES OF TERM.
	SUCCESSIVE SUSPENSIONS.
NEXT EVENTUAL ESTATE.	SURVIVING.
	SUSPENSION.
OPTION.	TAIL, ESTATE IN FEE.
	TERM.
PARTNERSHIP.	TENANCY.
PERPETUITIES.	TRANSFER.
PERSONAL PROPERTY.	TRUST.
PERSONS IN BEING.	TRUST, SUSPENSION BY.
	TRUSTEE.

TABLE OF INDEX TOPICS.

359

UNBORN PERSON.

USES.

VESTED AND CONTINGENT.

VESTING.

VOID.

WAIVER.

WIDOW.

WIFE.

WISCONSIN.

YEARS, TERM OF.

INDEX.

(References are to Pages.)

ABSOLUTE.

fee, in possession, 1, 2-4, 13-38, 75-83, 241.

ownership, essential elements, 77.

ownership, suspension of, 250-278.

ownership, several theories of, 256-258,

See PERSONAL PROPERTY; ALIENABILITY; POSTPONEMENT
OF VESTING.

power of alienation,

See ALIENABILITY; SUSPENSION; RULES.

power of disposition, 174-175.

when power of disposition confers fee, 174-175.

ACCUMULATION.

trusts for, See TRUST, SUSPENSION BY, (9).

beneficiary's right to assign, 113-118.

trust to satisfy mortgage as, 120-123.

statutory period for, 127-133.

anticipation of, 128, 133.

charitable trusts, 283.

ACQUIESCENCE, 25.

ADDITIONAL TERM.

of minority after two lives, 51-57, 197, 198, 217, 248, 249.

See MINORITY, STATUTORY PERIOD.

ALIENABILITY. See RULES; CONTINGENCIES, SUSPENSION BY;
TRUST, SUSPENSION BY; POWERS, SUSPENSION BY;
PERSONS IN BEING; CREATION OF THE ESTATE;
STATUTORY PERIOD; PERSONAL PROPERTY; CONVEY.

the general statutory provision, 13.

"absolute power of alienation, 13, 75-83, 240, 241.

suspension of, used in three senses, 13-16.

particular property inalienable, 13-14, 18-22.

(References are to Pages.)

ALIENABILITY.—*Continued.*

- property alienable, but proceeds inalienable, 14, 18-22, 23.
- the fund itself inalienable, 14-16, 22, 23.
- suspension of ownership of personalty, 15.
- "mischief" to be remedied by the statute, 4-11, 15-16, 177-204, 215, 216.
- necessary measure of suspension of, 38-97.
- reasons for the Rules, 4-11, 15, 177-204, 215, 216.
- inalienability means no persons able to convey, 13, 16-38, 75-83, 260.
- restraints on, 75-83.
- what does not prevent, 75-83.

ALIENS, 17, 105.

ALTERNATIVE.

- lives, to measure term, 62, 63.
- dispositions, 290-307.

ANALOGY.

- between real and personal property rules, 252-261, 278.
- between rules as to fee tail and as to "perpetuities," 184-186.

ANNUITY.

- trust for, 100, 110.
- trust to pay from rents, 123-127.
- payable under trust of second class, 126.
- causes no suspension, 118-127.
- may be charged on property, 126.
- may be payable through power, 126.
- future, cross remainders, 127.
- when transferable, 126.

APPOINTMENT. See **POWERS, SUSPENSION BY.**

- power of, causing suspension, 162-165.
- power of, ending suspension, 27.
- not causing suspension, 155.
- exclusive, 163.
- remainder in default of, 247.
- effect of power of, on vesting, 247.

ASSIGNMENT. See **TRUST, SUSPENSION BY.**

- when a conveyance, 17, 18.
- beneficiary when cannot make, 30.
- beneficiary if creator of trust can make, 30, 31, 33.
- general, for creditors, 43, 267.
- by beneficiary, restraints on, 111-118, 139-141, 260.
- contingent interests not subject to at common law, 179.

(References are to Pages.)

ASSIGNMENT.—*Continued.*

of contingent and executory interests, English statutes.
189, 190.

AUTRE VIE.

estate *pur autre vie*, 221, 224-228.

BAR, 25.**BENEFICIARY.** See TRUST, SUSPENSION BY; PERSONAL PROPERTY; CHARITY; STATUTORY PERIOD; PERSONS IN BEING.

protection of, a purpose of Rules, 10.
infancy of, causes no suspension, 24.
interference by, trust to cease, 24, 59.
ability of, to destroy trust, 28-37.
authority conferred on, to end trust, 34-38.
not "person who can convey," 30, 31.
inability to convey unavoidable, 36.
does not hold title, 30, 260.
cannot assign or release, 30, 103, 111-118, 139-141, 260.
creator of trust as, 30, 31, 33.
statutory authority to, to end trust, 33-38.
as remainderman, 33, 106.
merger of interests of, 33.
term need not be measured by life of, 45.
number of not limited, 71, 72.
in trust for accumulation, only minors, 100, 115, 128.
other trusts, may be for any persons, 100.
trustee and beneficiary, 103-108.
infant beneficiary, death of,
 See DEATH.
consent of, to revocation, 144.
of powers,
 See POWERS, SUSPENSION BY.
rights of creditors of, 31, 32, 260.
of trust in personal property, 266-277.
election by, to take property unconverted, 156-8, 168-71,
 288.

BENEVOLENT, See CHARITY.**BEQUEST.**

for life, gift over of "what may remain," 175.

BIRTH. See ACCUMULATION; STATUTORY PERIOD; CHILD; UNBORN PERSON; GESTATION; INFANT.

(References are to Pages.)

CEMETERY TRUSTS. See CHARITY.

CESTUI. See BENEFICIARY.

CHARGE.

causes no suspension, 118-127.

CHARITY, GIFTS FOR, 279-285.

(1.) *Prior to Laws 1893, Chap. 701.*

abolition of real property trusts, except four, 279.

trusts for charity thus abolished, 100-101, 279.

former law of charitable uses not retained, 279.

cy pres doctrine, 279, 283.

charitable trusts in personal property not abolished, 279.

their term restricted to two lives in being, 279.

gifts direct to charitable corporation, not trusts, 279, 280.

and so no suspension of alienability or ownership, 279, 280.

future gift to corporation to be formed, 280.

valid if term of vesting duly measured, 95, 280.

otherwise void, 95, 280.

one charitable corporation holding for another, 280.

power of corporation to take by grant, devise, bequest, 280.

foreign corporation, foreign community, state, nation, 280.

Legislature could create exceptions to its scheme, 280.

also trusts of real property could be created for the four
authorized purposes, 281.and personal property trusts for any purpose not unlaw-
ful, 281.

contingent gift to corporation, 230.

contingent on non-occurrence of named event, 230.

indefiniteness or uncertainty of beneficiaries, 281.

English law and statutory changes, references, 281.

(2.) *Since Laws 1893, Chap. 701.*

present statutes established a new scheme, 281-285.

indefiniteness or uncertainty of beneficiaries now, 281.

trustee may be named, and takes legal title, 282, 283.

if no trustee named, title vests in supreme court, 282, 283.

supreme court has control, 282.

when court may authorize changes to accomplish general
purpose, 282.

consent of donor or grantor, if living, 282.

attorney-general to represent beneficiaries, 282.

other statutes relating to charities, 282-283.

cemetery trusts, 282, 285.

personal property trusts for charity, 283.

retroactive effect of statutes, 283.

(References are to Pages.)

CHARITY, GIFTS FOR.—*Continued.*

- present statutes restore early law, 283.
- corporation may be formed to act as trustee, 283.
- trustee, designation of, 283.
- cy pres* statute applies to powers, 283.
- gift to foreign, unincorporated college, 283.
- charitable trust must not violate law as to accumulations, 283.
- indefiniteness of purpose, 283.
- indefinite trusts for private purposes, invalid, 284.
- charitable trust not restricted to statutory period, 284.
- but charities may have a relation to suspension, 284.
- might be inseparably connected with void scheme, 284.
- ultimate charity does not obviate intermediate suspension, 284.
- property may still be given direct to charitable corporation, 230, 284.
- incapacity to convey causes no suspension, 230.
- voluntary unincorporated associations, 285.
- vesting in interest in charitable corporation sufficient, 230.
- "perpetuities" and charitable trusts, 285.
- limitation on amount, to charity, 285.
- gifts, two months before death, former provision, 285.
- conflict of laws, 348-353.

CHATTELS, REAL.

- statutory period for, 74, 250, 251, 278.
- limitations of, 229.

CHILD. See **INFANT**; **MINORITY.**

- none deemed too old to have, 40.
- posthumous, 49.
- en ventre sa mere*, 47, 48, 130.
- eldest or youngest, 49, 50.
- children, meaning of term, 244, 245, 246.
- after born,—effect on of direction to sell, 288.

CHILDBEARING.

- none deemed too old to have child, 40.

CLASS.

- gifts to, remoteness, 51-57, 197, 198, 217, 248, 249.

COMBINATIONS

- of trusts and powers, result, 144-145.

(References are to Pages.)

COMPROMISE, 25.

CONDITION, See CONTINGENCY.

what, 31.

effect, 34, 35.

imposed on fee, 78.

precedent and subsequent, 89-90, 91, 97.

CONDITIONAL LIMITATION.

is now a remainder, 205.

CONFLICT OF LAWS, 348-353.

real property, law where land lies, 348-353.

personal property, law of owner's domicile, 348-353.

bearing of rules on suspension, and postponement, 348-353.

appointment of trustee, may involve finding of jurisdiction, 348.

scope of our laws on suspension, 349-353.

effect of laws of other jurisdictions here, 349-353.

presumption as to law elsewhere, 350.

public policy, 351, 352, 353.

when property remitted to other jurisdiction, 353.

CONSENT.

of court, not a "conveyance," 26, 103.

of third person, effect of requiring, 26, 28.

power to convey on, obviates suspension, 26.

of court, and of third person, distinguished, 27.

court cannot, to destroy trust, 26.

revocation upon, 144.

CONSTRUCTION, 308-347.

(1.) *General rules*, 308-311. intent controlling, 88, 158, 166, 168, 265, 308, 311, 313,
 340, 343, 345, 346.

void provisions may show intent, 308.

testator speaks as of what time, 308.

 construed as if no rules on suspension or postponement,
 308.

Rules then applied to determine validity, 309.

 if two constructions allowable, valid preferred, 71, 244,
 245, 309.

construction liberal, 71, 309.

testator presumed to know the law, 309.

testator presumed to intend valid will, 309.

testator may state rules to be followed, 293.

present public policy, when favored, 310.

(References are to Pages.)

CONSTRUCTION.—*Continued.*

effect given to every part of instrument, 310.

law seeks to avoid intestacy, 310.

favors absolute gift, as against less positive qualifications,
80, 310.

intended meaning overrides technical or ordinary meaning, 310.

court may transpose, reject or supply, 310.

evident intent controls position, presence or absence of
words, 311.

irreconcilable repugnancy, later clause prevails, 311.

“practical construction,” 25.

of powers, 149.

presumptions, 312, 313. See PRESUMPTIONS.

(2.) *Vested and contingent estates*, 311-347.

See CONTINGENCIES, SUSPENSION BY.

law favors vesting, 10, 311.

favors early vesting, 311.

never contingent if can be vested, 311.

“from and after,” “upon death of,” effect on vesting, 311.

presumptions favoring widow, heirs, issue, descendants,
312.

equality among children, 312.

against disinheritance if dying before possession, 312.

See DEATH.

residuary clauses, 312.

residue of residue, 312.

codicils, 312.

conflicting rules or presumptions, 313.

grantor or testator may create vested or contingent, 313.

when intent shown, statutory test applied, 313, 318.

estate to person not in being, must be contingent, 313.

vested, and contingent future estates, 313.

death of remainderman pending prior estate, 86, 87, 88, 91,
211, 312, 316, 332, 333.(3.) *Vested or contingent at common law*, 313-319.

the distinction stated and illustrated, 313-319, 329, 330.

(4.) *Vested or contingent in New York*, 319-343.

definitions of vested and contingent, 319.

whether these change common law or not, 319-340.

authorities reviewed, 319-340.

“heirs” as remaindermen, 319-340.

rules applicable to real and personal property, 341.

(References are to Pages.)

CONSTRUCTION.—*Continued.*

- gift immediate, enjoyment postponed, 341.
- gift future, depending on condition precedent, 341.
- only gift in direction to pay or convey, contingent, 341.
- futurity annexed to substance of gift, 341.
- if also words importing present gift, vested, 342.
- gift absolute, payment postponed, vested, 342.
- postponement to let in intermediate estate, 343.
- vested, mere possession postponed, 343.
- See POSSESSION.
- death without heirs, or issue, 343.
- means heirs or issue at death of ancestor, 343.
- fee, devise over on death, to survivors, 343.
- means death, survivorship, during testator's life, 343.
- but intent controls, 343.
- exception to rule, 344.
- lapse of devises and legacies, 345.
- statute abolishing estates tail, 345.
- statute affecting remainder on estate tail, 345.
- words of survivorship, when refer to time of distribution, 345.
- unless contrary intent shown, 345.
- personal property may be defeasibly vested, 265, 345, 346.
- rule favoring early vesting applies to legacies, 346.
- intent controls, 346.
- death before division, relating to time appointed, 346.
- death when presumed, 346.
- postponement for convenience of estate, 346.
- or for benefit of legatee, 346.
- effect of provisions as to interest or income, 346.
- effect of gift over of corpus, 347.
- gift of fund not in existence as such, 347.
- postponement of legacies charged, 347.

CONTINGENCIES, SUSPENSION BY, 84-97; 262-266.

- test of suspension, no persons to convey fee, 84.
- estates in possession, estates in expectancy, 84-85.
- estate in possession alienable, no suspension, 85.
- reversion, vested, possibly contingent, alienable, 85.
- reversions cause no suspension, 85.
- future estates either vested or contingent, 85, 311-347.

See CONSTRUCTION, (2), (3), (4); VESTED.

- vested, contingent, defined, 85.
- vested, several senses of the word, 85-88, 356.

(References are to Pages.)

CONTINGENCIES, SUSPENSION BY.—*Continued.*

- vested in possession, 85.
- vested in interest, 86.
- remainder, if vested, vested in interest, 86.
- when remainder vests in possession, 86.
- vested subject to divesting, 86, 89-90, 91, 356.
- such may be present or future estates, 86.
- divesting may be total or partial, 86.
- vested subject to open and let in, 86.
- effect of death, as to defeasance, 86, 87, 88, 91, 211, 312, 316, 332, 333.
- vested right to contingent estate, 87-88, 90, 91, 356.
- such right may be defeasible, 87-88.
- intent controls, 88.
- "vested contingently," meaning, 88, 356.
- vested sometimes means alienable, 88.
- sometimes inviolable, or non-defeasible, 88.
- vested estate always alienable, 88-90.
- except under certain trusts, 88.
- vested and alienable, causes no suspension, 88.
- but suspension may be caused by other limitations, 89, 92.
- thus vesting defeasibly implies contingent estate, 89.
- every contingency is both precedent and subsequent, 89-90, 91.
- contingent estates, two main groups, 90.
- first group, *event* uncertain, 90.
- here person in being to alien, 90.
- all expectant estates alienable, 90.
- if person in being, no suspension, 90, 92.
- defeasible vesting, and vested right in contingent estate, 91.
- second group, *person* uncertain, 92.
- such estates again divisible, into two classes, 92-93.
- first subdivision, class certain, particular person not, 92.
- here no suspension of alienability, 93.
- the test under Rule II, is different, 93.
- second subdivision, person not yet in being, 93.
- this class causes suspension, 94.
- because alienation impossible, 94.
- test of suspension illustrated, 94.
- validity of suspension depends on term, 95.
- sometimes validity caused by contingency, 95.
- corporation as person not yet in being, 95.

(References are to Pages.)

CONTINGENCIES, SUSPENSION BY.—*Continued.*

- contingent estates, rights, interests, 95.
- contingent potential estates, 95.
- chances, possibilities, 96-97.
- what contingencies effect no suspension or postponement, 96-97.
- right of entry, 96.
- possibility of reverter, 96.
- options, other releasable contracts, 96.
- mortgagees, 96-97.
- ownership of mortgage may be suspended, 97.
- judgments, 97.
- escheat, 97.
- covenants, reservations, easements, 97.
- condition subsequent, 89-90, 97.
- charge, 118-127.
- other illustrations, see 75-83.
- separating valid from void, 290-307.

CONTINGENCY. See VESTED AND CONTINGENT.

- suspension by, 84-97; 262-266.
- postponement by, 175-249.
- with double aspect, 294-307.
- alternative, 290-307.

CONTRAVENTION OF TRUST.

- conveyance in, void, 103, 109, 110, 139, 140, 141, 260, 267.

CONVICT.

- when "person in being," 24.

CONVERSION. See EQUITABLE CONVERSION.

CONVEY.

- persons who can. See PERSONS IN BEING; POWERS, SUSPENSION BY; ALIENABILITY; PERSONAL PROPERTY; ASSIGNMENT; BENEFICIARY; CREDITORS' RIGHTS; TRUSTEE.
- if can assign, can "convey," 17, 18.
- if can release, can "convey," 17, 18.
- inability to, suspension results, 17, 18.
- ability to, no suspension, 17, 22.
- mere ability to enable others to, 28.
- ability to must be absolute, 25-29.
- ability of beneficiary to, 28-37.
- contingencies, when cause inability to.
See CONTINGENCIES, SUSPENSION BY.
- trusts, when cause inability to.

(References are to Pages.)

CONVEY.—*Continued.*

- See TRUST, SUSPENSION BY.
- powers, when cause inability to.
- See POWERS, SUSPENSION BY.
- power to, effect of on suspension.
- See PERSONS IN BEING; ALIENABILITY.
- trustee's power to reconvey, 27.

CORPORATION. See CHARITY.

COURT.

- is not a "person" to convey, 23, 26.
- suspension until court decides, 42.
- sales by trustee with approval of, 103.
- power of, does not obviate suspension, 103.
- authority to anticipate accumulations, when, 116, 117.
- compelling execution of power. 163.
- when title vests in, 282, 283.
- splitting of gift by, 296-304.

COVENANTS.

- cause no suspension, 97.

CREATION OF THE ESTATE. See RULES; STATUTORY PERIOD;

- PERSONAL PROPERTY; POSTPONEMENT OF VESTING.
- statutory period counts from creation of estate, 38, 211.
- 218.
- in a deed, from delivery, 38.
- in a will, from testator's death, 38.
- powers, see POWERS.
- when an instrument is "testamentary," 38.
- occurrences before testator's death, importance, 39.
- occurrences after testator's death, when immaterial, 39,
- 57, 292.
- scope of this principle, 61-62.
- beneficiary need not be in being at, when, 71, 127-133.

CREDITORS' RIGHTS.

- in real and personal trusts, 31, 32, 260, 268.
- trusts to sell or mortgage or lease, 100, 110.
- in trust for accumulation, 116.

CY PRES.

- See CHARITY.

DEATH.

- of person to consent, effect, 27.
- testator's, creation of estate counts from, 38.
- testator's, importance of occurrences before, 39, 50.

(References are to Pages.)

DEATH.—*Continued.*

- testator's, occurrences after, immaterial, 39, 57.
- unless they disarrange general scheme, 292.
- testator's, law at time of, controls validity, 140.
- testator's meaning, as of what time construed, 308.
- of trustee, trust not ended by, 43.
- minority means until majority or earlier death, 47.
- partnership, funds to remain in, after death, 81.
- death intestate, causes no suspension, 82.
- promissory note payable after death, 82.
- defeasible vesting, effect of death during prior term, 86,
87, 88, 91, 211, 312, 316, 332, 333.
- death of infant beneficiary, devolution of accumulations,
123, 132.
- death without heirs, or issue, 343.
- fee, devise over on death, to survivors, 343.
- death before division, relating to time appointed, 346.
- death when presumed, 346.
- of beneficiary, when terminates trust, 43, 44.

DEED.

- creation of estate at delivery of, 38.

DEPOSIT.

- of stock for fixed term, effect, 82.
- of fund held for fixed term, 82.
- in bank, "in trust," 267.

DESIGNATION OF LIVES.

- See STATUTORY PERIOD (5).

DESTRUCTIBILITY.

- of trusts, by merger, revocation, 143-144.
- of remainders at common law, 196.
- of remainders, under Revised Statutes, 199.

DISCRETIONARY

- powers, 163.

DISPOSITION, ABSOLUTE POWER OF.

- See ABSOLUTE.

EASEMENTS.

- cause no suspension, 97.

ELECTION.

- to take property unconverted, 156-158, 168-171, 288.
- to take by descent, and not under power, 154, 292.
- by widow, 292.

(References are to Pages.)

EQUITABLE CONVERSION, 286-289.

defined, 286.

mere discretionary power does not effect, 287.

direction to sell may be implied, 287.

discretion in trustee, when immaterial, 288.

failure of purpose, 288.

election to take property unconverted, 156-158, 168-171,
288.

reconversion, 288.

surplus proceeds not needed for purpose of sale, 288.

direction to sell, effect on afterborn child, 288.

ESCHEAT.

causes no suspension, 97.

ESTATE.

scope of term, 208.

in fee, See **FEE**.for life, See **LIFE**.for years, See **YEARS**.in joint tenancy, See **TENANCY**.in common, See **TENANCY**.of trustee, See **TRUSTEE**.of beneficiary, See **BENEFICIARY**.

in personal property, 208.

expectant, See **EXPECTANT ESTATE**.in remainder, See **REMAINDER**.**ESTOPPEL, 25.****EXCHANGE.**

power to, effect on suspension, 21.

EXPECTANT ESTATE, 84-85.

alienable, devisable, descendible, 90, 259.

relation to remainders, 206.

FEE, ESTATE IN. See ABSOLUTE:

restraints on alienation, 75-83.

remainder on, 179, 205, 216-220.

remainder on, must vest by end of statutory period,
216-220.

when conferred by absolute power of disposition, 174, 175.

FORMER ADJUDICATION, 25.**FUTURE ESTATES. See CONTINGENCIES, SUSPENSION BY; POST-
PONEMENT OF VESTING; REMAINDERS; CONSTRUC-**

(References are to Pages.)

FUTURE ESTATES.—*Continued.*

TION; PERSONAL PROPERTY; VESTED AND CONTINGENT; ESTATE.

suspension by, 134.

same principles apply to suspension by trusts, 133-143.

GESTATION.

period of, 48, 49, 54.

GROSS, SUM IN.

under Revised Statutes, 112, 125.

HISTORY.

of perpetuities, suspension, postponement, 4-8, 177-204.

HUSBAND. See LIVES IN BEING, (9).

ILLEGALITY.

not presumed, 72, 73.

See STATUTORY PERIOD (17).

power not requiring illegality, not assumed void, 72, 73, 154.

IMPERATIVE.

statutory requirements are, 57, 58.

power to sell and divide, 161.

power to appoint, 162-165.

power to convey, 165-168, 170.

INDEFINITENESS.

of beneficiaries, 108, 281.

INFANT. See MINORITY; PERSONS IN BEING; BIRTH; BENEFICIARY; GESTATION; CHILD; CHILDBEARING.

purpose of Rules, to protect infants, 9.

disability due to infancy, no suspension, 24.

suspension during infancy of more than two, 42.

minority is a life, 46-48.

infant *in ventre sa mere*, 47, 48, 130.

minority or earlier death, 47.

additional minority after two lives, 51-57, 197, 198, 217, 248, 249.

See STATUTORY PERIOD (10).

minor as "person in being," 55.

minority not assumed, to defeat scheme, 72.

(References are to Pages.)

INFANT.—*Continued.*

accumulation for, See TRUST, SUSPENSION BY.

trust for accumulation, infant also remainderman, 123.

death of infant, devolution of property, 123, 132.

effect of will of infant, 123.

accumulation must be for infants only, 100, 115, 128.

and during minority only.

See TRUSTS, SUSPENSION BY (9).

election by minors to terminate power, 158.

contingent remainder in fee on remainder to infant in fee, 217.

remainder to infant, after two lives, 217.

remainder to children surviving to majority, 218.

INTENT.

controls, 88, 158, 166, 168, 265, 308, 311, 313, 340, 343, 345, 346.

INTESTACY.

causes no suspension, 82.

INSURANCE POLICY.

proceeds, trust in, non-assignable interest, 268.

ISSUE.

meaning, 244.

death without, 343.

JOINT TENANCY.

nature of, 66-70, 224-228.

presumption against, 66-71.

whether estate in is *pur autre vie*, 224-228.**JUDGMENT.**

causes no suspension, 97.

LACHES, 25.**LAW.** See LEGISLATURE.**LEASES.**

under express trusts, 118-127.

meaning, 118-127.

LEGACY.

trust to pay, causes no suspension, 118-127.

LEGISLATURE.

not a "person" who can convey, 23.

power over trusts, 23, 34, 36.

power over rules concerning suspension, 23.

(References are to Pages.)

LEGISLATURE.—*Continued.*

State as property owner, 23.
retroactive, retrospective, *ex post facto* laws, 23.

LIFE. See STATUTORY PERIOD.

estate for, 220-228.
restraints on estate for, 78-81.
remainder on estate for, could be barred, 179.
remainder on, when must vest, 220-228.
successive estates for, only first two valid, 220, 259.
ultimate remainder accelerated, 220, 221, 222, 259.
estate *pur autre vie*, 221, 224-228.
estate for life in term of years, 221.
estates for classified, 227.

LIVES IN BEING. See STATUTORY PERIOD; PERSONAL PROPERTY.

MAJORITY. See INFANT; ACCUMULATION; POSTPONEMENT OF
VESTING; STATUTORY PERIOD; CHILD; MINORITY.

MEASURE. See STATUTORY PERIOD; TERM.

of suspension or postponement, 40-60.
subordinate, when, 58-62.

MERGER.

when and when not, 33, 106.

MICHIGAN, 354-356.

MINNESOTA, 354-356.

MINORITY. See INFANT.

suspension for, after two lives, 51-57, 197, 198, 217, 248, 249.
disability due to infancy, no suspension, 24.
minority is a life, 46-48.
minority or earlier death, 47.
minor as "person in being," 55.
minority not assumed, to defeat scheme, 72.
trust for accumulation during, 100, 115, 128.
death during, 123, 132.
election during, to terminate power, 158.
remainder to such as reach majority, 218.

MORTGAGE.

suspension until mortgage paid, 41.
itself, causes no suspension, 96-97.
ownership of, may be suspended, 97.
trust to satisfy from rents, 120-123.

(References are to Pages.)

MUST.

- alienability must be certain by end of term, 57, 58, 61, 62, 240.
- vesting must be certain by end of term, 210-213, 214, 218, 219, 241, 259, 294, 295.
- must vest in interest when, 213, 214, 219.

NEXT EVENTUAL ESTATE.

- persons presumptively entitled to, 145, 260, 356.

OPTION.

- does not occasion suspension, 96, 97.
- ability to convey must depend on mere, 25, 27, 29.

PARTNERSHIP.

- funds to remain in after death, 81.

PERPETUITIES. See CONTINGENCIES, SUSPENSION BY; TRUST, SUSPENSION BY; POWERS, SUSPENSION BY; POSTPONEMENT OF VESTING; RULES; PERSONS IN BEING; REMAINDERS; SUSPENSION; ALIENABILITY.

- term not used in N. Y. Statutes except in one instance, 7, 285, 356.
- relation of N. Y. Rules to common law, 4-8, 177-204, 181, 190-198, 200-204.
- purposes, 8-11, 15-16, 177-197, 198-204.
- views of, when our statutes framed, 4-8, 177-204.
- early law, no strict rule concerning, 179.
- why not then needed, 179.
- history of, 4-8, 177-204.
- different theories concerning, 181, 182, 186, 187, 190, 191, 192, 193, 195-198, 199.
- relation to remainders, 183, 190, 196, 197, 198, 199.
- gifts for charity, 279-285.
- personal property, 250-278.

PERSONAL PROPERTY, 250-278.

- (1.) *Rule II, Absolute ownership*, 250.
- no suspension beyond statutory period, 250.
- all suspension caused by trusts, contingencies, or powers, 261.

(References are to Pages.)

PERSONAL PROPERTY.—*Continued.*

- (2.) *The general statutory provision*, 250–251.
 two lives in being the maximum term, 250, 251, 253.
 chattels real, 250, 251.
 meaning of “absolute ownership,” 251–262.
 the two Rules in real property, merged in one in personal,
 251–252, 253, 255.
 suspension, here refers both to alienability and to vesting,
 17, 252.
 several theories of absolute ownership, 256–258.
 first theory, absolute ownership means alienability, 256.
 second theory, it means vesting, and alienability by bene-
 ficial owner, 257.
 third theory, it means vesting, and alienability by any one,
 257.
- (3.) *Rules for real and personal property similar*, 252–261.
 except as to term, real property principles apply, 252, 254,
 255, 258, 278.
 this results from statute, and by analogy, 258, 259.
 personal property statutes when applicable to real prop-
 erty, 259.
 illustrations of applying like principles to real and per-
 sonal, 259–261.
 thus, preference for tenancy in common, 66–72, 228, 259,
 309.
 distinction between vested and contingent, 259.
 that remainders must vest by end of statutory period, 259.
 statutes as to successive life estates, 220, 221, 222, 259.
 and acceleration of remainder, 220, 221, 222, 259.
 that expectant estates are alienable, devisable and descend-
 ible, 259.
 the test of alienability, 260.
 that acts in contravention are forbidden, 103, 109, 110, 139,
 140, 141, 260, 267.
 that certain beneficial interests are not transferable, 111–
 118, 139–141, 260.
 rights of beneficiaries’ creditors, 31, 32, 260, 268.
 next eventual estate; rents undisposed of, 145, 260.
 trust to apply, implies right to collect, 260.
 that beneficiary has no legal title, 30, 260.
 that trust ceases when purpose ends, 260.
 that all powers abolished and new code adopted, 4, 5, 260,
 278.

(References are to Pages.)

PERSONAL PROPERTY.—*Continued.*

thus definition and classification of powers, 4, 5, 147-150, 261.

method of computing suspension under power, 261.

restrictions on estate to be given, 261.

existence of power, effect on vesting, 261.

absolute power of disposition, as effecting fee, 174-175, 261.

that will passes all property covered by power, 261.

some statutes not same for real and personal, 261.

thus, statute abolishing all trusts except certain, 261.

or statute allowing further minority for suspension or postponement, 261.

(4.) *Suspension by contingencies*, 262-266.

any contingency suspends absolute ownership, 262, 264, 265.

whether alienability suspended or not, 262, 263, 264, 265.

test lies in vesting and alienability, 262.

contingency must cease with two lives, 263, 264.

vesting subject to divesting, 263, 345-346.

whether only remainders must vest, 265.

"remainder" applies to both real and personal property, 208, 265.

personal property may become alienable before vesting, 265.

test of vesting same as in real property, 265, 345-346.

controlling effect of intent, 265.

special principles of construction, See CONSTRUCTION.

(5.) *Suspension by express trusts*, 266-277.

some trusts cause suspension, others not, 266.

effect on alienability, 266.

trusts may be for any purpose not wrongful, 266, 267.

deposits in bank in trust, 267.

trustee cannot transfer in contravention, 103, 109, 110, 139, 140, 141, 260, 267.

beneficiary of certain trusts cannot assign, 111-118, 139-141, 260, 267.

in others he can assign, 267.

trusts cease when purpose or term ceases, 267.

duration of general assignment for creditors, 43, 267.

trusts apply income, beneficiary cannot assign, 268.

trusts to accumulate, beneficiary cannot assign, 268.

proceeds of insurance policy, in trust, not assignable, 268.

(References are to Pages.)

PERSONAL PROPERTY.—*Continued.*

- not to be reached by creditors, exception, 268.
- trusts for accumulation like realty statute, 268.
- term not the same, 268.
- when property partly real, partly personal, 268.
- revocation of trust by creator, on consent, 144, 268, 269.
- destruction of trust by merger, former statute, 268.
- whether power to sell and distribute, obviates suspension, 269-277.
- postponement of possession does not suspend ownership, 270.
- title in trustee does not necessitate suspension, 271.
- analogy to real property, 271, 272.
- title to personal property in executor, in trust, 272.
- title in executor causes no suspension, 272.
- if power to sell valid, and interests vested, no suspension, 273.
- if power void, or interests not vested, when suspension, 273.
- if power co-operates to effect undue suspension, void, 273.
- mere existence of trust does not necessitate suspension, 273, 274.
- these propositions illustrated, 275-277.
- charitable trusts, 279-285.
- (6.) *Suspension by powers*, 278.
 - the abolition of powers, applies to personal property, 4, 5, 260, 278.
 - the subject now regulated by statute, 278.
 - analogy to real property, 278.
- (7.) *The statutory period*, 278.
 - two lives only, 278.
 - rule as to chattels real, 74, 250, 251, 278.
- (8.) *Conflict of laws*, 348-353.

PERSONS IN BEING, 16-38.

See ALIENABILITY; ASSIGNMENT; CONVEY; CONTRAVENTION; SUSPENSION; RULES; TRUST, SUSPENSION BY; CONTINGENCIES, SUSPENSION BY; POWERS, SUSPENSION BY; PERSONAL PROPERTY.

(1.) *In general.*

- "no persons in being," 16-38, 75, 84, 94, 98, 110, 150, 153.
- several causes for absence of, 75, 150.
- no persons who can convey, 16-38, 150, 153.
- if "no persons," inalienability results, 16-38, 75-83, 240.

(References are to Pages.)

PERSONS IN BEING.—*Continued.*

- if every interest conveyable, no suspension, 16-17, 75-83, 240, 241.
- this principle not applicable to Rule II, 17, 75-83, 241.
- if conveyable by many, uniting, no suspension, 17.
- releases are conveyances, 17, 18.
- assignments are conveyances, 17, 18.
- if any interest non-conveyable, suspension results, 17-18.
- principles applicable to personalty, 17.
- effect of alienage, 17.
- limitation to persons not in being, suspension, 18.
- certain express trusts, non-conveyable, suspension, 18-19.
- powers, similar principles, 18.
- power to alien, obviates suspension, 19, 75-83, 240, 241.
- authority to defer sale, no suspension, 19.
- power not fettered by authority to defer, 19.
- nor by suggestion to defer, 19.
- nor by need of time to sell to advantage, 19.
- power to sell property and proceeds, no suspension, 19-20.
- power, relation of to suspension, 20-21.
- obviates suspension when, and how far, 20-21, 171, 172.
- depends on validity of purpose, 20-21.
- if proceeds still inalienable, suspension, 20-21.
- exchange, power to, effect on suspension, 21.
- "fund" inalienable though property saleable, 14-16, 18-22.
- suspension not caused by mere failure to convey, 22, 75-83, 240.
- if persons who can convey, no suspension, 22, 75-83, 240.
- four rules on "no persons in being," 22-38.
- (2.) "*Persons*" must represent all interests, 22-23.
- and be able, together, to convey fee, 22-23.
- statutory sales do not obviate suspension, 23.
- for proceeds still inalienable, 23.
- and legislature is not a "person," 23.
- legislative power over trusts, 23, 34, 36.
- and over rules concerning suspension, 23.
- State as property owner, 23.
- retroactive, retrospective, *ex post facto*, laws, 23.
- court is not a "person," 23, 26.
- (3.) *Absence of "persons" must be due to instrument*, 23-25.
- so must their presence, to obviate suspension, 23-25.
- disability due to infancy, no suspension, 24.

(References are to Pages.)

PERSONS IN BEING.—*Continued.*

- inalienability through outside causes, immaterial, 24.
- convict is "person in being," 24.
- trust to cease if beneficiary "interferes," 24, 59.
- trust to cease if hostile claims, 24.
- estoppel, laches, waiver, bar, 25.
- acquiescence, former adjudication, 25.
- compromise, practical construction, 25.
- (4.) *Ability to convey must be absolute*, 25-29.
 - must depend on mere option, 25, 27.
 - must not depend on condition precedent, 25, 26, 29.
 - judge is not a "person," 23, 26.
 - his consent is not a "conveyance," 26.
 - his consent is condition precedent, 26.
 - court cannot consent to destroy trust, 26.
 - court decides upon the facts, 26.
 - consent of third person, effect of requiring, 26, 28.
 - power to convey on consent obviates suspension, 26.
 - consent of court, and third person, distinguished, 27.
 - death of person to consent, 27.
 - trustee's power to reconvey, 27.
 - or to terminate the trust, 27.
 - such power obviates suspension, 27.
 - power to appoint, and end suspension, 27.
 - reserved power to revoke, 27, 28, 59.
 - revocation not "in contravention," 28.
 - personal property, statutory power to revoke, 28.
 - power to convey to beneficiary when debts paid, 28.
 - power to sell for fixed price, or less on consent, 28.
- (5.) *Ability must be to convey clear fee*, 28.
 - mere ability to enable others to convey not sufficient, 28.
 - beneficiary's ability to indirectly terminate trust, 28-37.
 - generally, beneficiary not "person who can convey," 30.
 - he does not hold title, 30.
 - he cannot assign or release, 30.
 - creator of trust as beneficiary, 30.
 - creator-beneficiary may assign interest, 30, 31, 33.
 - but trust continues and trustee holds title, 30, 31.
 - and trustee cannot convey, 30, 31.
 - and trust for own benefit causes suspension, 30, 31.
 - trust until creditors' bill filed, 31.
 - trust till judgment entered, 31.
 - indirect acts by beneficiary not "conveyance," 31.

(References are to Pages.)

PERSONS IN BEING.—*Continued.*

- such acts only condition precedent, 31.
- creditors' rights, 31-32.
- in real and personal trusts, 32.
- statutory authority to beneficiary to end trust, 33.
- beneficiary as remainderman, 33, 106.
- generally no merger, or termination of trust, 33.
- but statute may provide otherwise, 33.
- effect of such statute on suspension, 33.
- history of the statute, 33.
- power of Legislature over trusts, 23, 34, 36.
- authority to beneficiary to end trust, 34-38.
- four views of such authority, 34-38.
- (a.) mere power to perform condition, suspension, 34, 35.
- (b.) not transfer of interest, and obviates suspension, 35.
- (c.) renders trust inoperative, when, 35.
- (d.) is attempt to evade statute, and void, 36.
- beneficiary's inability to convey cannot be avoided, 36.
- test in applying foregoing views, 36.
- (6.) *Number of "persons in being," unlimited*, 37, 38.
- (7.) *When remaindermen need not be*, 211.

POSSESSION.

- mere postponement of, immaterial, 76-77, 194, 213, 270, 343.
- estate in, 84-85.
- estate in alienable, no suspension, 85.
- vesting in, when requisite, 213, 214, 233-239; 239-247.

POSSIBILITY. See **MUST**; **CONTINGENCY**; **RULES**.

- effect on suspension, 57, 58, 96, 97.
- effect on postponement, 210-213, 275.
- of reverter, 96, 209.
- on possibility, 180.
- of illegal exercise of power, 72, 73, 154.

POSTPONEMENT OF VESTING, 175-249.

- (1.) *Rule II. Vesting.* See **RULES**.
 - vesting can be postponed for statutory period only, 2, 176.
 - Rules I and II contrasted, 1-11, 176.
 - reasons for Rules I, II and III, 8-11, 15-16, 177-204, 214, 215, 216.
- (2.) *Historical*, 4-8, 177-204.
 - theory that there is no Rule II, 4-11, 177, 181.
 - scope of former Rule against Perpetuities, 2-4, 177-204, 181, 190-193.

(References are to Pages.)

POSTPONEMENT OF VESTING.—*Continued.*

- theory that it related to alienability only, 2-4, 177-204, 181.
- theory that our statutes are likewise restricted, 2-4, 177.
- relation of Rule against Perpetuities to our law, 2-4, 177, 178, 181, 190-198, 200-204.
- our statutes on vesting of remainders, 1-11, 178.
- they make up our Rule II, 178.
- views of Rule against Perpetuities when our statutes framed, 179, 181.
- early English law, no strict Rule against Perpetuities, 179.
- why not then needed, 179.
- remainder when could not be limited on fee, 179.
- nor contingent freehold on term of years, 179.
- estates tail, and remainders thereon could be barred, 179, 184, 186.
- remainder on life estate could be barred, 179.
- contingent interests non-transferable, 179.
- needs of that time met by principles other than the Rule, 179-180.
- grant to unborn person, remainder to his children, 180.
- possibility on a possibility, 180.
- early history of rule concerning remoteness, 4-8, 180, 181.
- purpose and scope of Rule against Perpetuities, 1-16, 177-204.
- three theories on nature of Rule against Perpetuities, 181.
- first theory, it required alienability only, 181, 191.
- second theory, it required vesting only, 181, 196-7.
- third theory, it required either vesting or destructibility, 181, 182, 183, 184, 185, 186, 187, 190, 191, 192, 193, 195, 197, 198.
- modifications of these views, 182.
- theory that Rule against Perpetuities did not affect remainders, 183, 190, 196, 197.
- relation of alienability, and vesting as a means thereto, 183, 186, 192.
- references to common law writers on perpetuities, 184-198.
- vesting, element of common law Rule against Perpetuities, 184, 187, 188-195.
- vesting, element in common law estate tail Rule, 184, 185, 186.
- two lives, and minority, figured in both these rules, 185.
- analogies and differences between these common law rules, 184, 186.

(References are to Pages.)

POSTPONEMENT OF VESTING.—*Continued.*

- English statute of 1844 abolishing contingent remainders, 189.
- its subsequent repeal, 189.
- English statutes rendering contingent and executory interests alienable, 190, 191.
- reasons for vesting as element of English Rule against Perpetuities, 192.
- objection to contingencies, though fee alienable, 192, 193, 194.
- complications of ownership objectionable, 193.
- capricious remoteness incident to contingencies, objectionable, 194.
- mere postponement of possession only, not objectionable, 194.
- English statute against destruction of remainder by failure of precedent estate, 196.
- it referred only to those complying with Rule against Perpetuities, 196.
- gifts to classes, remoteness, 197, 198.
- (3.) *The general statutory scheme*, 198–204.
 - reasons for the Rules embodied in statutes, 8–11, 15, 16, 177–197, 199, 201, 215, 216.
 - perpetuities caused by inalienability, view of revisers, 198, 199.
 - they also provided rules as to vesting, 199, 200, 201, 203, 204.
 - remainders not “destructible” under Revision, 199.
 - vesting as a means to effect alienability, 199, 200, 201.
 - same statutory period as for suspension, 201, 202.
 - relation of the Rules relating to alienability and to vesting, 202.
 - Rule II, Vesting, derived from several statutes, 202.
 - Rule I, Alienability, the more frequently applied, 202, 203.
- (4.) *“Remainders,”* 204–210.
 - Rule II, Vesting, relates only to “remainders,” 204, 205.
 - present scope of such remainders, 205, 206, 208, 210.
 - include conditional limitations, 205.
 - include limitation on fee, 205.
 - compared with common law remainders, 205.
 - relation to expectant estates in general, 206.
 - Kent's views of remainders under Revision, 206.
 - Revisers' explanatory notes, 206, 207.

(References are to Pages.)

POSTPONEMENT OF VESTING.—*Continued.*

- springing and other uses, 206.
- Revisers' forms of definition, 207.
- other uses of remainder and remainderman, 207.
- "estates," scope of term, 208.
- "estates" in personal property, 208.
- "remainders" in personal property, 208, 265.
- future estates are subjected to general statutory rules, 208, 209.
- possibilities of reverter are not estates, 209.
- possibilities of reverter unobjectionable under Rule II, 209.
- Rule II, vesting, applies to estates created, not reserved, 209.
- reversions not affected by Rule II, vesting, 209.
- reversions said to be sometimes contingent, 209.
- they are expectant, but not future, estates, 209.
- (5.) "*Within the statutory period*," 210.
- means during or at end of period, 210.
- (6.) "*Must vest*." "*If ever*," 210-213.
- meaning of *must* in this connection, 210-211.
- death of remainderman pending precedent estate, 86, 87.
- 88, 91, 211, 312, 316, 332, 333.
- when remainderman need not be person in being, 211.
- if once vests, Rule does not require divesting, 211.
- test is at time of creation, 211.
- provision that estate *must end after* statutory period, valid, 212.
- (7.) *Must vest "in interest"*, 213-214, 218, 219.
- vesting in interest defined, 213.
- remainders must vest in interest when, 213, 214.
- if duly vested in interest, postponement of possession usually immaterial, 213.
- number of allowable contingencies unlimited, 213.
- in certain cases, vesting in possession required, 213, 214.
- improbability of contingency immaterial, 214.
- when vested remainder invalidated by contingent, 214.
- when valid and void separable, 214.
- (8.) *Sources of Rule II*, 2-11, 214-216.
- reasons for Rule II, 8-11, 15-16, 177-204, 214, 215, 216.
- Rules aimed at freedom, not restriction, 215.
- (9.) *Remainder on a fee*, 216-220.
- must vest by end of statutory period, 216-220.

(References are to Pages.)

POSTPONEMENT OF VESTING.—*Continued.*

- fee or other less estate on fee, 216.
- contingent remainder in fee, on prior remainder in fee, 216.
- these two classes distinguished, 217.
- the second includes minority after two lives, 217.
- remainder on estate tail, 217.
- remainder to children surviving to reach majority, 218.
- trusts for persons not in being at creation of estate, 218.
- test of validity depends on time of creation of estate, 218.
- and on possibility then, of not vesting in time, 218, 219.
- (10.) *Remainder on estate for life*, 220–228.
 - must vest by end of statutory period, 220–228.
 - successive estates for life, 220.
 - all but first two void, 220.
 - ultimate remainder accelerated, 220.
 - no remainder on estate *pur autre vie*, unless in fee, 221.
 - similar as to such estate in term of years, 221.
 - estate for life of more than two outsiders, 221.
 - remainder takes effect at death of first two, 221.
 - these rules apply to legal, not equitable, estates, 221, 232.
 - estate for life in term of years, when, 221.
 - only vested ultimate remainders can be accelerated, 221, 222.
 - life-estates to tenants in common, 222.
 - where cross-remainders, 222.
 - remainders to persons in being cannot impair alienability, 222, 223.
 - cross-remainders, when postpone vesting, 223.
 - they are successive estates, 223.
 - separating valid from void, 73, 214, 223, 290, 293.
 - when not separable, 223.
 - cross-remainders though no tenancy in common, 224.
 - remainder on life estate to joint tenants, 66–70, 224–228.
 - nature of joint tenancy, 66–70, 224–228.
 - whether such estate is “*pur autre vie*,” 224–228.
 - estates for life classified, 227.
 - presumption against joint tenancy, 66–71, 228.
- (11.) *Remainder on term of years*, 229–231.
 - must vest by end of two lives, 229–231.
 - when only to person in being at creation, 229.
 - limitations of chattels real, 229.
 - term of suspension of absolute ownership limited, 229.

(References are to Pages.)

POSTPONEMENT OF VESTING.—*Continued.*

remainder of freehold or chattel real, 229.

contingent gift to corporation, 230.

contingent on non-occurrence of named event, 230.

postponement of vesting for term of years, 230.

incapacity of existing corporation causes no suspension, 230.

vesting in interest in charitable corporation sufficient, 230.

See CHARITY, GIFTS FOR.

(12.) *Remainder on estate in trust*, 231-239.

trustee has title, 231.

trustee's estate a fee, for life, or years, 231, 233.

vesting of remainder on, by what statutes required, 231, 233, 234, 235.

vesting in possession by end of statutory period, 233, 234, 235, 236, 237, 238, 239.

"remainder," meaning of in this connection, 236.

trust to sell, gift of proceeds, sort of remainder, 236.

(13.) *Remainder on execution of power*, 239-247.

power that obviates suspension, may not obviate postponement, 239-247.

reasons for distinction, 239-247.

Rule I deals only with alienability, 240.

if power makes sale possible, no suspension, 240.

but Rule II, provides that remainder must vest, 240.

power does not insure such vesting, 240, 241.

postponement of vesting illustrated, 242-247.

"children," meaning of term, 244, 245, 246.

"issue," meaning of term, 244.

construction preferred which supports validity, 71, 244, 245, 309.

vesting, effect on, of power to sell, or convey, 247.

(14.) *Remainder in default of appointment*, 247.

general principles applicable, 247.

future estate limited in default of appointment, 247.

effect of the power, on vesting of, 163, 166, 247.

(15.) *Remainder to class*, 248-249.

contingent, 247-248.

vested subject to divesting, 248.

void if not to vest in due time, 248.

vested interest when sustained, though contingent void, 248-249.

(16.) *Statutory period for postponement*, 249.

(References are to Pages.)

POWER. See **POWERS, SUSPENSION BY.**

remainder on execution of, 239-247.

obviating suspension, may not obviate postponement, 239-247.

to convey, obviates suspension, 16, 17, 20, 21, 171, 172, 240, 241.

See **POWERS, SUSPENSION BY; PERSONS IN BEING, (1);****POSTPONEMENT OF VESTING, 239-247.**

codification of law of powers, 4, 5, 260, 278.

if purpose illegal, power void, 273-277.

effect of, on vesting, 163, 166, 247.

failure of purpose, effect. See **PURPOSE.****POWERS, SUSPENSION BY, 147-175; 278.** See **ALIENABILITY;****PERSONS IN BEING; PERSONAL PROPERTY; SUSPENSION; RULES; POWER.****(1.) Powers defined and classified, 147-150.**

power defined, 147.

codification of powers, 4, 5, 260, 261.

general powers, 147, 148.

special powers, 148.

beneficial powers, 148.

beneficial powers not specified, void, 148.

general powers in trust, 148.

special powers in trust, 148.

designation of beneficiary, 148.

reservation of powers by grantor, 148, 149.

creation of powers, 149.

construction of powers, 149.

execution of powers, 149.

termination of powers, 149; see **PURPOSE.**

further definitions relating to powers, 149.

when trust valid as, 107.

(2.) Relation of powers to title, 149-150.

two classes of powers, 149.

one class confers fee on grantee, 149.

the other retains title and power distinct, 149.

power to executor to change life estate to fee, 150.

(3.) Relation of powers to suspension, 150-154.

test of suspension, absence of persons to convey, 16-38, 150, 153.

number of ways to effect suspension, 75, 150.

trusts and contingencies are two ways, 150.

suspension by instrument executing power, 150.

(References are to Pages.)

POWERS, SUSPENSION BY.—*Continued.*

- period computed from creation of power, 150.
- power to sell only in future, suspension when, 150, 151, 152, 153.
- thus in a sense three ways to cause suspension, 151.
- these methods examined and compared, 151, 152.
- who can take under exercise of power, 152.
- what can be given under such exercise, 152.
- validity at time of creation of power, the test, 152.
- suspension by power while still unexercised, 152.
- mere possibility of unauthorized acts by donee, no suspension, 72, 73, 154.
- execution in favor of person who would take if no execution, 154.
- (4.) *Powers not occasioning suspension*, 154-159.
 - (a.) beneficial powers, 154-155.
 - existence of, causes no suspension, 154, 155.
 - execution of, may cause suspension, 155.
 - (b.) general powers to sell and convey, 155.
 - existence of, causes no suspension, 155.
 - so with general power to sell, appraise and divide, 155.
 - or sell and distribute, 155.
 - or convey absolutely to designated persons, 155.
 - or appoint among designated persons, 155.
 - (c.) powers to hold and manage, 76, 77, 155-156.
 - existence causes no suspension, 156.
 - accordingly, not restricted in term, 156.
 - but if alienability suspended, term restricted, 156.
 - when trust not sustainable as power to manage, 156.
 - (d.) terminable powers to sell, 156-158.
 - conversion directed, election to take unconverted, 156.
 - when election may be exercised, 156-158.
 - exercise of election terminates power, 157.
 - when beneficiary vested with title, may convey free of power, 157.
 - when such conveyance annuls power, 157.
 - power in trust exercisable only for beneficiary, 157.
 - donee has no personal interest, 157.
 - if exercise for beneficiary impossible, power fails, 157.
 - when beneficiary of power may release to vested owner, 157.
 - powers annulable by beneficiary, no suspension, 157, 158.
 - doctrine of election founded on presumption of intent, 158.

(References are to Pages.)

POWERS, SUSPENSION BY.—*Continued.*

- whether minor may elect to end power, 158.
- even if not, apparently no suspension, when, 158.
- inalienability by infancy causes no suspension, 24, 158.
- (e.) revocable powers, 158-159.
 - powers not revocable unless authority reserved, 158-159.
 - when revocable, no suspension, 159.
- (5.) *Powers that do occasion suspension*, 159-171.
 - (a.) powers of sale, proceeds to trustee, 159-161.
 - if the trust must occasion suspension, power co-operates, 159, 160.
 - power to sell, may obviate suspension as to land, 160.
 - but trust occasions suspension as to proceeds, 160.
 - in such cases suspension really caused by the trust, 160, 161.
 - to be valid, must be duly measured, 160.
 - (b.) powers of sale, proceeds to persons not in being, 161, 162.
 - occasion suspension, 161.
 - suspension really caused by contingency, 161.
 - if persons entitled all in being, no suspension, 161, 162.
 - if persons yet unborn may be entitled, suspension, 162.
 - vesting, subject to divesting in favor of unborn persons, 162.
 - if duly measured, such suspension valid, 162.
 - (c.) imperative powers to appoint, 162-165.
 - when occasion suspension, 162.
 - no persons in being to convey, 162, 163.
 - imperative and discretionary powers, 163.
 - when possible appointees have no present rights, 163.
 - when court can compel execution, 163.
 - but cannot control discretion, 163.
 - term of suspension not duly measured, void, 163.
 - some objects of power not within limits, effect, 163.
 - exclusive appointment, 163.
 - effect of power, upon vesting, 163.
 - if donee chooses to execute illegally, appointment void, 164.
 - if term of suspension duly measured, valid, 164.
 - suspension really caused by contingency or trust, 164.
 - (d.) imperative powers to convey, 165-168.
 - no selection by donee, 165.
 - conveyance to indicated group, 165.

(References are to Pages.)

POWERS, SUSPENSION BY.—*Continued.*

- when future interest contingent, 165.
- survivorship essential to taking, 165.
- when interest vested defeasibly, 165-166.
- effect of power upon vesting, 166.
- intent controls, 166.
- if grantees named, power consistent with vesting, 166.
- when vesting in possession though no conveyance, 166, 167.
- suspension in this group really caused by contingency, 167.
- if duly limited, not illegal, 168.
- so imperative power to convey to trustee, 167.
- when causes suspension, 167.
- remainder to one, and if deceased, to issue, no necessary suspension, 167.
- intent may be for issue to take by succession, 167.
- if so, first taker could dispose of all absolutely, 167.
- and issue would have no independent rights, 167.
- (e.) non-terminable future power of sale, 168-171.
 - if exercise in meantime prohibited, suspension, 168, 169.
 - no election permitted, to take unsold, 168, 169.
 - every power must substantially comply with its conditions, 168, 169.
 - intentions of grantor must be observed, 168.
 - exceptions, 168.
 - time of exercise of power, when material, 169.
 - unlawful restriction on exercise of power, when separable, 170.
 - grounds of suspension by this group examined, 170.
 - statute no longer forbids suspension by "any limitation whatever," 170.
 - if power for illegal purpose, when suspension, 171.
 - power for illegal purpose is void, 171.
 - if suspension in this group, caused by power itself, 171.
- (6.) *Powers that obviate suspension*, 171-172.
 - illustration, 111, 160, 171-172, 239-247, 269-277.
 - power to sell may obviate suspension by trust, 171-172.
 - and yet not obviate postponement of vesting, 239-247.
- (7.) *Statutory period as to powers*, 172-175.
 - time of suspension computed from creation of power, 172-175.
 - creation of power defined, 172.
 - tests of validity, 172-175.

(References are to Pages.)

POWERS, SUSPENSION BY.—*Continued.*

test by reading into original instrument not always correct, 173-174.

who may take under a power, 174.

validity if at creation of power as test, 174.

absolute power of disposition confers fee, 174-175.

thus the power disappears, 175.

in such case, test by date of original instrument inapplicable, 175.

suspension by donee measured from its own date, 175.

gift to one, remainder over of "what may remain," 175.

PRESUMPTIONS. See **CONSTRUCTION.**

none that scheme is illegal, 72, 73.

PROMISSORY NOTE.

payable after death, no suspension, 82.

PURPOSE. See **INTENT; TERMINATION.**

failure of, effect on trust, 43, 260, 267.

failure of, effect on power, 44, 157.

illegality of, effect, 20, 21, 171, 273-277.

purpose of Rules, See **RULES**, (7).

RELEASE. See **ASSIGNMENT.**

is a conveyance, 17, 18.

releasable restriction, no suspension, 81.

RELIGIOUS. See **CHARITY.****REMAIN.**

gift over of what may remain, 175.

REMAINDERS. See **POSTPONEMENT OF VESTING; CONTINGENCIES, SUSPENSION BY; PERSONAL PROPERTY; RULES; CONSTRUCTION; VESTED AND CONTINGENT; FUTURE ESTATES; TENANCY.**

what are, 205, 206, 208, 210, 319-343.

at common law, 205, 313-319, 329, 330.

vested in interest, 86.

when vests in possession, 86.

vesting and divesting, 85-88.

beneficiary of trust may own remainder, 33, 106.

third person may own remainder after trust, 106.

remainder to one, if deceased to issue, 167.

gift to one, remainder over of "what may remain," 175.

remainder on a fee, 179.

(References are to Pages.)

REMAINDERS.—*Continued.*

- remainder on former estate tail, 179, 184, 186.
- freehold on term of years, 179.
- remainder on life estate formerly could be barred, 179.
- remainder to children of unborn person, 180.
- destruction of remainder by failure of precedent estate, 196.
- change in that law, 196, 199.
- remainders under Rule II, postponement of vesting, 204-210.
- scope of the term, 205, 206, 208, 210.
- include conditional limitation, 205.
- include limitation on fee, 205.
- remainders in personal property, 208, 259, 265.
- death of remainderman pending precedent estate, 86, 87, 88, 91, 211, 312, 316, 332, 333.
- when remainderman need not be person in being, 211.
- when remainders must vest in interest, 175-249.
- if vested in interest, postponement of possession usually immaterial, 213, 214.
- vesting of remainder on fee, 216-220.
- vesting of remainder on life estate, 220-228.
- successive life estates, result, 220, 221, 232, 305-307.
- remainder accelerated if vested, 220, 222, 305, 307.
- remainder on estate *pur autre vie*, 221, 224-228.
- in term of years, 221.
- remainder on estate to tenants in common, 222, 223.
- cross-remainders, 223, 224.
- remainder after joint tenancy, 224-228.
- remainder on term of years, 229-231.
- remainder on estate in trust, 231-239.
- remainder on execution of power, 239-247.
- remainder in default of appointment, 247.
- remainder to class, 248-249.
- remainder in personal property, analogy to real property, 208, 259-261, 265.
- "remainder" exists in both kinds of property, 265.
- vested and contingent, distinction same, personal and real, 259, 341.
- personal, remainder when accelerated, 259, 305-307.
- personal, must vest in two lives, 263, 264.
- alternative, one valid, one void, when can be "split," 296-304.

(References are to Pages.)

REMAINDERS.—*Continued.*

“heirs” as remaindermen, 319-340.

bequest for life, gift over of “what may remain,” 175.

REMOTENESS. See POSTPONEMENT OF VESTING; RULES; REMAINDERS; PERSONAL PROPERTY, STATUTORY PERIOD.

RENEWALS.

perpetual, no suspension, 83.

perpetual, no postponement of vesting, 83.

RENTS AND PROFITS.

See TRUST, SUSPENSION BY.

leases, 118-127.

satisfaction of mortgage from, 120-123.

payment of annuities from, 123-127.

trust to apply, statutory period for, 133-143.

trust to accumulate, statutory period, 127-133.

disposition of, 136-143.

undisposed of, who takes, 145-146, 260.

next eventual estate, persons entitled to, 145, 146, 356.

REPUGNANCY. See CONSTRUCTION.

effect, 78.

RESTRAINTS

on alienation, 75-83.

See SUSPENSION; PERSONS IN BEING; ALIENABILITY; RULES.

REVERSION

expectant but not future estate, 209.

causes no suspension, 85, 209.

subject to trust, 106.

causes no postponement of vesting, 209.

whether ever contingent, 209.

REVOCATION,

reserved power of, 27, 28, 59.

not “in contravention,” 28.

in personal property trust, 28, 143, 144.

on consent of persons interested, 144, 268-269.

of powers, 158-159.

RIGHT OF ENTRY, 96.

RULE IN SHELLEY'S CASE.

abolished, 320.

RULES. See ALIENABILITY; CONTINGENCIES, SUSPENSION BY; TRUST, SUSPENSION BY; POWERS, SUSPENSION BY; POSTPONEMENT OF VESTING; PERSONS IN BEING;

(References are to Pages.)

RULES.—*Continued.*CREATION OF THE ESTATE; STATUTORY PERIOD;
PERSONAL PROPERTY.

- (1.) *In general.*
two Rules for realty, 1, 84-97, 108-118, 150-154, 176.
one Rule for personalty, 1, 250.
- (2.) *Rule I, alienability*, 1, 84-97, 108-118, 150-154.
term of suspension, 1, 39-97.
scope, 1-4.
- (3.) *Rule II, vesting*, 2, 175-249.
term of postponement, 2, 249.
applies to remainders, 2, 204-210.
scope, 1-4.
- (4.) *Rule III, absolute ownership*, 2, 250-278.
term of suspension, 2, 250, 251, 253, 278.
scope, 2-4.
- (5.) *Scope of Rules*, 2-4, 75-76, 83, 177-204.
illustrations, 2-4.
alienability and vesting, 2-4.
tests of suspension and postponement, 2-4.
mutual relations of Rules, 3.
- (6.) *Historical*, 4-8, 177-204.
relation of Rules to common law, 4-8, 177-204, 215.
powers, codified, 4-5.
trusts, all abolished except four, 4, 100, 101, 279.
later, charity trusts revived, 4, 281, 284, 285.
personal property trusts, 4-5, 279, 283.
Rules represent codification, 6.
"perpetuities" at common law, 6, 177-204.
"perpetuities" and alienability, 6, 177-204.
"perpetuities" and vesting, 6, 177-204.
"remoteness" of vesting, 6, 177-204.
views of different authorities, 7, 177-204.
"perpetuities" in New York, 7, 198-204.
term not used in statutes, 7.
except as to cemetery trusts, 285, 356.
charities, relation of Rules to, 281-285.
- (7.) *Purposes of Rules*, 8-11, 15-16, 177-197, 198-204, 215.
public policy, 8, 215.
Rule I, 8-9.
to limit term of inalienability, 8.
to render property marketable, 8, 215.
and capable of disposition, 8.

(References are to Pages.)

RULES.—*Continued.*

- bad effects if no Rules, 8, 192-195, 201, 215.
- reasonable restrictions, 4-9, 15-16, 177-204, 215, 216.
- Rule II, 9-11, 181-198, 215.
- to prevent waste of values, 9.
- to protect minors, 9.
- to protect inexperienced persons, 9.
- to prevent litigation, 9.
- to prevent complications of ownership, 192-194, 215.
- to avoid injury to beneficiaries, 10.
- to encourage improvements, 10, 215.
- to facilitate administration of law, 10.
- law always favored vesting, 10, 311.
- see in general §§ 31-36, and 177-204, 215.
- Rule III, purposes are similar, 11. See **PERSONAL PROPERTY**.

SEPARABILITY, 290-307.(1.) *General principles*, 290-293.

- invalidity of part, when not fatal to all, 73, 214, 223, 290, 293.
- distinction between separable and inseparable schemes, 290.
- if inseparable, and part void, all fails, 290, 293.
- if separable, void may be cut out, 291.
- whether personal property more readily severable, 291, 292.
- though valid and void in one trust, may be separable, 292, 293.
- effect of events when or after instrument takes effect, 292.
- election by widow to take dower, 292.
- election to take under will or otherwise, 292, 356.
- no separation of valid and void if main intent frustrated, 293.
- bearing of fact that given contingency does not actually occur, 293.
- testator may provide rules, in case of partial invalidity, 293.

(2.) *Alternative future dispositions*, 294-307.

- invalidity of one, effect on other, 294.
- bearing of rule that validity must not depend on future events, 294.
- that rule stated and applied, 294, 295.

(References are to Pages.)

SEPARABILITY.—*Continued.*

- validity of future disposition, when court may defer decision, 295.
- contingencies with double aspect, 295.
- (3.) *Simple alternative contingencies*, 296.
- (4.) *Involved alternative contingencies*, 296-304.
 - when grantor or testator splits the gift, 297-304.
 - when the court cannot split the gift, 297-304.
 - illustrations, 298-304.
 - when event without limit may involve one within, 298.
 - if he has no son to attain 25, void, 298, 300, 302.
 - no son to attain 25, or none at all, valid, 298, 300, 302.
 - English distinction, according as future gift is remainder or not, 304.
 - doctrine of splitting, no application to separate shares, 304.
- (5.) *Contingencies with alternative application*, 304-307.
 - uncertainty as to which share affected by invalidity, 304-307.
 - test, whether uncertainty may exceed statutory period, 304-307.
 - contingent remainder, when not accelerated, 305-307.
 - successive life estates, 305-307.

SEPARATE PERIODS

- for separate shares, 64-71.
- division and sub-division, 64-66, 69.

SHARES.

- separate period for each share, 64-71.
- separating valid from void, 290-307.

SPLITTING

- of gift, by testator, or by court, when, 296-304.

SPRINGING USES, 206.

 STATUTORY PERIOD, 38-75. See CREATION OF THE ESTATE;
 RULES; POSTPONEMENT OF VESTING; PERSONAL
 PROPERTY; ALIENABILITY.

- (1.) *In general*, 38.
 - same for suspension and postponement, 38, 176, 201, 202.
 - not the same for realty and personalty, 38.
- (2.) *Two lives in being*, 39-97, 185.
- (3.) *Scope of term*, 39, 210.
- (4.) *Two lives the necessary measure*, 40-42.
 - except for further minority in certain cases, 40.
 - what at common law, 185.

(References are to Pages.)

STATUTORY PERIOD.—*Continued.*

- suspension for "statutory term," naming no lives, void, 40.
- term of years, illegal measure, 40, 41.
- suspension, no lives named, void, 40.
- none too old to have children, 40.
- suspension until partition, void, 41.
- or until mortgage paid, void, 41.
- or until fixed date, void, 41.
- or for more lives than two, 41.
- or during life of unborn person, 41.
- or until majority of more than two, 42.
- or after two lives, 42.
- or in perpetuity, 42.
- or for one life plus one moment, 42.
- suspension until judicial decision, effect, 42.
- decision of court does not create validity, 42.
- void and valid alternatives, 42.
- cessation of purpose, terminates trust, 43, 44, 59, 60, 115, 116, 142, 143, 260, 267.
- (5.) *Designation of lives*, 43-45.
 - how to be designated, 43.
 - implied limitation to two lives sufficient, 43, 59, 60.
 - thus trust for two, ends with their lives, 43.
 - trust not ended by death of trustee, 43.
 - nor by his resignation or removal, 43.
 - nor by conveyance to beneficiary, 43.
 - trust created to end with trustee's life, 43.
 - purpose may fail before trust begins, 43.
 - failure of purpose when presumed, 43.
 - presumption in general assignments, 43.
 - when lives must be designated, 44.
 - second life uncertain while first continues, 44.
- (4.) *Any two lives*, 45.
 - any lives may measure term, 45.
- (5.) *Part of life, is a life*, 45-46.
 - term may be shorter than two lives, 45-46.
 - part of life, counts as a "life," 46.
- (6.) *Minority is a life*, 46-48.
 - a minority counts as a life, 46.
 - illustrations and exceptions, 46-48.
 - minority as a "life in being," 47.
 - infant *en ventre sa mere*, 47, 48, 130.
 - minority means or until earlier death, 47.

(References are to Pages.)

STATUTORY PERIOD.—*Continued.*

- additional minority after two lives, 51-57.
- (7.) *Period of gestation*, 48.
 - relation to suspension or postponement, 48, 54.
 - posthumous children, 49.
- (8.) *Life of "eldest" or "youngest,"* 49-50.
 - different meanings of terms, 49.
 - rule of construction, 50.
 - facts at creation of estate control, 39, 50.
- (9.) *Life of wife, widow, husband*, 50-51.
 - rule of construction, 50, 51.
 - widow as person in being, 51.
- (10.) *Additional term of minority*, 51-57.
 - when allowed for suspension or postponement, 52.
 - meaning of "minority," 52.
 - different theories stated, 52-57.
 - in trusts for accumulation, 52.
 - in trusts for application of rents, 52.
 - alternative remainders, 53.
 - one actual infancy intended, 54-55.
 - remainder limited on "first" remainder, 54.
 - minor as "person in being," 55.
- (11.) *Statutory requirement is imperative*, 57-58.
 - term must be certain to end in due time, 57.
 - not enough that it may do so, 57.
 - validity depends on what might happen, 57.
 - not on what does actually happen, 57.
 - meaning of this principle, 61-62.

See *MUST*.
- (12.) *Subordinate measures of period*, 58-62.
 - when allowable, if term duly limited, 58.
 - thus, for joint lives of three, 59.
 - period less than two lives, 59.
 - reservation of power to revoke, 27, 28, 59.
 - terminable if any "interference," 24, 59.
 - or by trustee on certain events, 59.
 - failure of essential feature ends trust, 43, 44, 59, 60, 115, 116, 142, 143, 260, 267.
 - personal property, 59.
 - illustrations of valid and void double measures, 60-62, 356.
- (13.) *Alternative lives*, 62-63.
- (14.) *Successive suspensions*, 63.

(References are to Pages.)

STATUTORY PERIOD.—*Continued.*

- when allowable by separate instruments, 63.
- when not, 63.
- (15.) *Separate periods for separate shares*, 64-71.
 - separate suspension for each share, 64-71.
 - scope and illustrations, 64-71.
 - division and subdivision, 64-66.
 - tenancy in common, 66, 222.
 - joint tenancy, 66, 224-228.
 - distinction as affecting suspension, 66.
 - presumption as to tenancy, 66-71, 228.
 - scope and illustrations, 66-71.
 - applies to realty and personalty, 67, 70.
 - methods of effecting separation, 68.
 - cross-remainders of shares, 68-69.
 - re-subdivision of shares, 69.
 - law favors construction involving validity, 71, 309.
 - trustee tenant in common with owners, 71.
- (16.) *Number of beneficiaries not limited*, 71-72.
 - no restriction on number, 71.
 - need not be in being at creation of estate, 71.
 - use may be shifted during term, 71.
- (17.) *Illegal term is not presumed*, 72-73.
 - facts causing invalidity not assumed, 72.
 - such facts must be proved, 72.
 - thus minorities, or given ages, not so assumed, 72.
 - term not prolonged, by inference, to illegal extent, 72.
 - power not requiring illegality, not assumed void, 72, 73, 154.
 - but assumed to be power to do lawful act, 72, 73.
 - if exercise of power illegal, valid portions when saved, 73, 290-307.
 - too extensive exercise of power, 73.
 - imperative and discretionary powers, 73.
- (18.) *Statutory period for contingencies*, 73.
- (19.) *Statutory period for trusts to apply*, 133-143.
- (20.) *Statutory period for trusts to accumulate*, 127-133.
- (21.) *Statutory period as to powers*, 172-175.
- (22.) *Statutory period as to chattels real*, 74.
- (23.) *Statutory period as to rents and profits*, 74.
- (24.) *Statutory period for postponement of vesting*, 249.
- (25.) *Statutory period as to personal property*, 278.
- (26.) *Certain dispositions not affected*, 75-83; 96-97; 118-127; 240, 241.

(References are to Pages.)

STATUTORY PERIOD.—*Continued.*

- absence of "persons in being," when, 75.
- only three causes for such absence, 75, 150.
- sometimes said to be only two causes, 75, 150.
- if no suspension, Rule I inapplicable, 75-76, 83.
- if no postponement of vesting, Rule II inapplicable, 75-76, 83.
- if no suspension of ownership, Rule III inapplicable, 75-76, 83.
- (a.) mere postponed possession, no suspension, 76-77. See POSSESSION.
 - this applies to realty and personalty, 76.
 - also to estates vested in enjoyment, 76.
 - and to estates vested in interest, 76-77.
 - mere power to withhold possession, no suspension, 76, 155, 156.
 - in such cases, no limit to term, 76.
 - any resulting invalidity, not due to suspension, 77.
- (b.) trust to pay principal and income, no suspension, 77.
 - such a trust involves alienability and vesting, 77.
 - essential elements of absolute ownership, 77.
- (c.) absolute transfer, prohibiting alienation, 78-81.
 - effect of prohibition upon suspension, 78.
 - such condition, imposed on fee, void, 78.
 - effect of partial restraints, on alienability, 78.
 - when such conditions repugnant, 78.
 - invalidity for repugnancy, effect, 79.
 - conditions when releasable, effect, 79.
 - if no persons in being to release them, effect, 79.
 - absolute devise not reduced by doubtful later words, 80, 310.
 - scope of this principle, 80.
 - fee to one, power of sale to another, no suspension, 80.
 - restrictions on sale of terms for life or years, 80.
 - mere prohibition on alienation, effect, 80.
 - unless alienation impossible, no suspension, 80.
 - in such cases grantor may release, 81.
 - releasable restriction, no suspension, 81.
 - existence of "persons" to convey, obviates suspension, 81.
 - under Rule I, immaterial *who* can alien, 81.
 - if alienable, immaterial by whom, 81.
- (d.) partnership, funds to remain in, after death, 81.
 - if vested and alienable, no suspension, 81.

(References are to Pages.)

STATUTORY PERIOD.—*Continued.*

- (e.) agreement to deposit stock for a term, 82.
if vested and alienable, no suspension or postponement, 82.
so with common fund held by trust company, 82.
- (f.) intestacy causes no suspension, 82.
- (g.) promissory note payable after death, 82.
here no property inalienable or contingent, 82.
covenant for perpetual renewals, no suspension, 83.
same, no postponement of vesting, 83.
- (h.) right of entry; possibility of reverter, 96.
- (i.) options; mortgages, 96-97.
- (j.) other illustrations, 96, 97, 118-127, 240, 241.

STATUTORY SALES.

effect on suspension, 23.

SUBORDINATE MEASURES OF TERM.

when allowable, 58-62.

SUCCESSIVE SUSPENSIONS

by separate instruments, 63.

SURVIVING. See **STATUTORY PERIOD**, (8); **POSTPONEMENT OF VESTING**; **SEPARABILITY**.

SUSPENSION. See **RULES**; **CONTINGENCIES**, **SUSPENSION BY**; **TRUST**, **SUSPENSION BY**; **POWERS**, **SUSPENSION BY**; **ALIENABILITY**; **PERSONS IN BEING**; **CREATION OF THE ESTATE**; **PERSONAL PROPERTY**; **CHARITY**; **STATUTORY PERIOD**.

Rule I, alienability, 1, 84-97, 108-118, 150-154, 250-278.
illustrations, 2-4, 18-19.

historical, 4-8.

purpose of Rule concerning, 8-11, 15.

See **RULES** (7).

three senses of suspension, 13-16.

meaning of inalienability, 13, 16-38.

effect of power to sell, 19-22.

statutory period for suspension, 38, 39-83.

when no suspension, 75-83, 96, 97, 240-241.

successive suspensions, 63.

suspension by contingencies, 84-97, 161, 164, 167.

suspension by trusts, 98-146, 160, 161, 164.

suspension by powers, 147-175.

suspension, personal property, 250-278.

statutory period, 38-83.

rules of construction, 308-347.

how many ways to effect suspension, 75, 150.

(References are to Pages.)

TAIL, ESTATE IN FEE

- could be barred, 179, 184, 186.
- remainder on, 217, 345.
- remainder on, could be barred, 179, 184, 186.
- common law rule as to vesting of, 184, 185, 186.
- estates tail abolished, 345.
- bearing of statute as to remainder on, 345.

TENANCY.

- severalty, common, joint, 64-71, 224-228.
- bearing on suspension or postponement, 66, 224-228.
- presumption as to, 66-71, 228, 309.
- applies to realty and personalty, 67, 70, 259.
- trustee tenant in common with others, 71.

TERM. See RULES; STATUTORY PERIOD; CREATION OF THE ESTATE;
PERSONAL PROPERTY.

- of suspension or postponement, 40-60.
- separate for separate shares, 64-71.

TERMINATION.

- when purpose ceases, trust or power ends, 43, 44, 59, 60, 115, 116, 142, 143, 260, 267.

TRANSFER.

See ASSIGNMENT; CONVEY; ALIENABILITY.

TRUST.

See TRUST, SUSPENSION BY.

- passive, 102.
- secret, 102.
- implied, resulting, 102.
- for married women, 102
- future, 111.
- precatory words, 102.
- which trusts cause suspension, 103, 109, 110.
- remainder on estate in, must vest when, 231-239.
- ceases when purpose ends, 43, 44, 59, 60, 115, 116, 142, 143, 260, 267.
- mere existence of, causes no suspension, 271-277.
- personal property, 266-277.
- for charity, See CHARITY.

TRUST, SUSPENSION BY, 98-146; 266-277. See TRUST.(1.) *In general.*

- Revisers' explanation of inalienability, 98.
- express trusts may occasion suspension, 98, 110.
- not every express trust does so, 98, 110.
- test is absence of "persons in being," 99, 110.

(References are to Pages.)

TRUST, SUSPENSION BY.—*Continued.*

- persons in being who cannot convey, 99, 110.
- all trusts abolished except four, 4.
- except trusts in personal property, 4.
- creation and declaration of trusts, 99–100.
- declaration, personal property, 100.
- four classes of express trusts, beside charities, 100.
- the statutory classification, 100.
- to sell for creditors, 100, 110.
- to sell, mortgage or lease, 100, 110.
- for annuitants, other legatees, 100, 110.
- or to satisfy charges, 100, 110.
- to receive and apply rents, 100, 110.
- to receive and accumulate rents, 100, 110.
- first three classes for benefit of any persons, 100.
- fourth class for minors only, 100, 115, 128.
- essential elements of express trusts, 100–101.
- non-essentials, 101.
- trusts not authorized by statute, abolished, 100–101, 279.
- trusts for other purposes, no title in trustee, 101.
- may be valid as power, 101.
- but not to validate void suspension, 102.
- passive trusts, 102.
- secret trusts, 102.
- implied, resulting trusts, 102.
- trusts for married women, 102.
- future trusts, 111.
- precatory words, 102.
- two of the authorized classes, suspension, 103, 109, 110.
- the other two, no suspension, 103, 109, 110, 121.
- trust ceases when purpose ends, 43, 44, 59, 60, 115, 116, 142, 143, 260, 267.
- (2.) *Trustee and beneficiary*, 103–108.
 - sales by trustee, in contravention of trust, void, 103, 109, 110.
 - mortgages, sales, leases, etc., with court approval, 103.
 - power of court does not obviate suspension, 103.
 - beneficiary under certain trusts, cannot transfer, 103, 111–118.
 - under others, he can, 103, 111–118.
 - trusts created prior to statute, 103.
 - if trustee and beneficiary incapacitated, suspension, 104, 111–118.

(References are to Pages.)

TRUST, SUSPENSION BY.—*Continued.*

- title in trustee, subject to trust, 104.
- beneficiary has no title to trust property, 104, 107.
- beneficiary may enforce performance, 104, 107, 108.
- aliens as trustees, 105.
- trustee only takes the trust estate, 105.
- in other respects title may be elsewhere, 105.
- beneficiary may be vested remainderman, 33, 106.
- in such case, no merger, 106.
- so in personal property, 106.
- remainderman may be third party, 106.
- reversionary interests, subject to trust, 106.
- power to convey at end of trust term, 107.
- trustee may have fee, while trust lasts, 107.
- devise to sell or mortgage, power to receive rents, 107.
- if no such power, no title in trustee, 107.
- but trust valid as power, 107.
- in such case title passes to heirs or devisees, 107.
- what rule applicable to grants, 107.
- creator of trust may be trustee, 107.
- real creator may not be person executing instrument, 107.
- indefiniteness of beneficiaries, 108.
- same person as trustee and beneficiary, 108.
- receipt of rents by grantor, effect on validity, 108.
- actual property right under trust, in beneficiary, 108.
- trustee has no property right, for himself, 108.
- (3.) *What trusts occasion suspension*, 108-118, 160, 161, 164.
test, no "persons in being," 109.
- (4.) *Trustee cannot sell in contravention of trust*, 103, 109.
if conveyance not in contravention, not void, 109.
two classes of trusts cause suspension, 103, 109, 110, 121.
the other two do not, 103, 109, 110, 121.
trusts to sell, or mortgage, or lease, primary purpose, 109, 121.
in such cases, grantee's duty imperative, 109.
and discretionary power insufficient, 110.
and no suspension results, 110.
trust to sell, when may aid in creating suspension, 110.
trusts to receive and apply, or accumulate, suspension, 110, 121.
but accompanying trust or power may obviate suspension, 111.
future trusts may occasion suspension, 111.

(References are to Pages.)

TRUST, SUSPENSION BY.—*Continued.*

- (5.) *Restrictions on transfers by beneficiary*, 111-118.
 effect in creating suspension, 103, 104, 111.
 power to transfer, by ending purpose, might end trust, 111, 112.
 assignability by beneficiary, and alienability by trustee, usually go together, 112.
 statute on beneficiary's inability to transfer, 103, 112.
 "sum in gross," under Revised Statutes, 112.
 application of statute to four trust classes, 112, 113.
 trusts to sell, or to mortgage, or to lease, beneficiary may assign, 113.
 trusts to receive and apply rents, beneficiary cannot assign, 113.
 trusts to accumulate, beneficiary's right to assign considered, 113-118.
 under such trusts, beneficial rights not assignable, 113-118.
 such was the rule under Revised Statutes, 114.
 commissioners of revision intended no change, 114.
 non-assignability under trusts to "apply," includes to "accumulate," 114.
 thus "to apply" is satisfied by direction to "pay," 115.
 trust to pay quarterly, or annually, unassignable, 115.
 assignability by beneficiary of accumulation, would be inconsistent, 115.
 such a trust only for infants, 100, 115, 128.
 if assignable, then accumulation for adult, 115.
 or else trust would cease, and no suspension, 115, 116.
 creditors' rights, trust for accumulation, 116.
 court authority to apply accumulations, when, 116, 117.
- (6.) *"Leases" under express trusts*, 118-127.
 which trusts involve power to lease, 118-120.
 when power to lease implied, 118.
 "lease" to pay annuities, 118-127.
 "lease" to pay other legacies, 118-127.
 "lease" to satisfy charge on land, 118-120.
 meaning of the term "lease," 118-120, 121, 122, 123, 124, 125, 127.
 means to alienate, not prevent alienation, 124.
 when trustee, second class, may receive rents, 127.
- (7.) *Trust to satisfy mortgage from rents*, 120-123.
 when this would cause accumulation, 120, 122.

(References are to Pages.)

TRUST, SUSPENSION BY.—*Continued.*

- not authorized purpose of accumulation, 120, 121.
- two classes of trusts are to effect alienation, 121.
- two others are to prevent alienation, 121.
- trust to mortgage belongs with former, 122.
- under such trust, trustee cannot apply rents, 122.
- methods of employing rents to pay mortgage, 122.
- whether trustee can ever apply rents to mortgage, 122, 123.
- trust for accumulation, infant also remainderman, 123.
- whether payment of mortgage then allowable accumulation, 123.
- death of infant, devolution of property, 123, 132.
- where accumulations would then vest, 123.
- effect of will of infant, 123.
- disposition of accumulations by original instrument, 123, 132.
- (8.) *Trust to pay annuity from rents, 123-127.*
 - meaning of "lease" for such trusts, 118-120, 121, 122, 123, 124.
 - does not cover technical lease by trustee, 124.
 - such lease to pay annuities, not allowed, 124.
 - trust to lease is a trust to alienate, 124.
 - trust to lease is not a trust for suspension, 124.
 - trust to lease does not authorize receipt of rents, 124.
 - trust for annuities from rents, falls within third class, 125.
 - third class authorizes receipt of rents and profits, 125.
 - when annuities are sums in gross, 125.
 - and when consequently assignable, 125.
 - trust for annuities, third class, causes suspension, 125.
 - trust to pay specified sums from rents, 125.
 - annuities may be payable under second class, 126.
 - annuities may be charged on realty or personalty, 126.
 - word "annuities" does not change statute in substance, 126.
 - annuities may be payable through power, 126.
 - bequest of annual interest on specified sum, 127.
 - future annuities, cross-remainders, 127.
 - in what cases annuities transferable, 126.
 - when transferable, no suspension, 127.
- (9.) *Statutory period, trusts to accumulate, 127-133.*
 - the statutory provisions, 127-128.
 - same, personal property, 132-133.
 - accumulation only for statutory purposes, 127, 129.

(References are to Pages.)

TRUST, SUSPENSION BY.—*Continued.*

- restoration of depletion, from rents, not accumulation, 129.
- royalties from ore excavated, added to principal, 129.
- anticipatory payment of income, restored from rents, 129.
- premium on bonds bought, rents reserved against, 129.
- accumulation only within statutory limits, 127, 129, 135.
- unless allowed by statute, accumulation void, 127, 128, 129, 133.
- possible trifling exceptions, 132.
- may commence on creation of estate, 128, 132.
- for minors than in being, 128, 130, 132.
- infant *en ventre sa mere*, is in being, 47, 48, 130.
- to terminate by their majority, 128, 132.
- may commence after creation of estate, 128, 132.
- within time for vesting of future estates, 128, 130.
- or in personalty, time for suspension of ownership, 132.
- and during minority of beneficiaries, 128, 130, 132.
- to terminate by their majority, 128, 131, 132.
- if term named too long, only excess void, 128, 131, 133.
- no accumulation before birth of infant, 130.
- anticipation of accumulation, 128, 133.
- accumulation must be for infant only, 128.
- unless otherwise provided by statute, as, for charities, 123.
- may be implied, 128.
- separable void accumulation, effect on general scheme, 129.
- two statutes govern term of suspension, 129.
- accumulation, when may be after two lives, 130, 131.
- in personal property, two lives only, 133.
- cannot be for fixed period, or unmeasured term, 131.
- successive accumulations, when, 131.
- at majority, fund belongs to minor, 131.
- during minority, it vests as it accrues, 131, 132.
- subject to the trust during minority, 132.
- not divested by death during minority, 123, 132.
- passes to beneficiary's next of kin, 123, 132.
- or to his legatees, 123, 132.
- unless original instrument provides otherwise, 132.
- when purpose ceases, trust ends, 43, 44, 59, 60, 115, 116, 142, 143, 260, 267.
- (10.) *Statutory period, trusts to apply rents*, 133-143.
 - such trusts occasion suspension, 133.
 - term of suspension under Revised Statutes, 133.

(References are to Pages.)

TRUST, SUSPENSION BY.—*Continued.*

- term of suspension under Real Property Law, 133-143.
- Revised Statutes, *every* suspension prohibited, beyond term, 134, 170.
- change of form, in Real Property Law, 134.
- prohibition now applies to *future estates*, 134.
- but effect of statute unchanged, 134-143, 170.
- suspension by trusts restricted by statute, 136.
- disposition of rents and profits, how governed, 136-143.
- controlled by same principles as future estates, 136-143.
- no change in meaning to be assumed, 138.
- legislative approval of this construction, 138.
- rule for real and personal property presumably identical, 138, 252-261.
- term of such trusts in personalty is restricted, 138.
- decisions involving restriction of term of suspension, 138, 139, 140, 141.
- trust to apply, no conveyance in contravention, 139-141.
- trust to apply, beneficiary cannot assign, 139-141.
- trust to apply causes suspension, 139-141.
- law at testator's death controls, 140.
- trust to apply, maximum term, Real Property Law, § 42, 141, 142.
- same, term for each beneficiary, Real Property Law, § 96, 141, 142.
- term may be measured by lives of beneficiaries, 142.
- the "natural term" and the "stipulated term," 142.
- when either expires, trust must cease, 43, 44, 115, 116, 142, 143, 260, 267.
- trust to apply, does term cover further minority, 143.
- destructibility of trusts by merger, revocation, 143-144.
- what destructible, according to date of creation, 143.
- personal property trusts, when revocable, 143, 144.
- revocable by creator, on consent of persons interested, 144.
- (11.) *Combinations of different trusts and powers.*
 - one or more trusts may be combined, 144.
 - trusts and powers may be combined, 144.
 - results of such combinations, 144.
 - effect on suspension of alienability, 144.
 - powers of sale, obviating suspension, 144, 145.
 - trust or power may nullify alienability, 145.
 - if intent to have suspension for undue term, void, 145.

(References are to Pages.)

TRUST, SUSPENSION BY.—*Continued.*

(12.) *Rents and profits undisposed of.*

when suspension caused by expectant estate, 145.

rents undisposed of and not accumulated, 145.

go to persons presumptively entitled to next eventual estate, 145.

statute applies to real and personal property, 145.

what facts render it applicable, 145, 146.

common law rule for similar cases, 146.

(13.) *Trusts in personal property*, 266-277.

TRUSTEE. See TRUST, SUSPENSION BY.

in general, 103-108.

sales by, in contravention of trust, 103.

See CONTRAVENTION.

title in, 104, 231, 271, 272.

alien as, 105.

creator of trust may be, 107.

same person as, and beneficiary, 108.

estate of, whether for, in fee, for life or years, 231, 233.

UNBORN PERSON.

limitation to, suspension, 18.

during life of, 41.

divesting in favor of, 162.

grant to, remainder to his children, 180.

trust for, 218.

USES.

See CHARITY.

VESTED AND CONTINGENT. See POSTPONEMENT OF VESTING; CONTINGENCIES, SUSPENSION BY; REMAINDERS; RULES; STATUTORY PERIOD; EXPECTANT ESTATES; VESTING; CONSTRUCTION.

alienability and vesting, 2-4.

"perpetuities" and vesting, 6, 177-204, 215.

"remoteness" of vesting, 6, 177-204.

reasons for requiring vesting, 4-11, 15-16, 177-204, 215, 216.

vested or contingent, rules of construction, 308-347.

effect of alienage, 17.

if vested, mere postponed possession immaterial, 76-77.

(References are to Pages.)

VESTED AND CONTINGENT.—*Continued.*

See POSSESSION.

vested in enjoyment, 76.

vested in possession, 86.

vested in interest, 76, 77, 86, 213, 214.

if vested and alienable, no suspension or postponement,
82, 88.

reversions are vested, perhaps may be contingent, 85.

future estates vested or contingent, 85.

vested, contingent, defined, 85.

vested, several senses of word, 85.

vested contingently, 88, 356.

vested subject to divesting, 86, 89, 90, 91, 263, 356.

vested always alienable if no trust, 88-90.

vesting defeasibly, implies contingent estate, 89.

contingent, as to person, or event, 90.

vested right in contingent estate, 91.

contingent estates, rights, interests, 95.

contingent potential estates, 95.

what contingencies cause no suspension or postponement,
96, 97.powers co-operating with contingencies to effect suspension,
159-171.

Rule II, as to vesting, 2, 176, 181-187, 190-195, 197, 202.

our statutes on vesting, 1-11, 178, 190-204.

vesting as a means to alienability, 183, 186, 187, 188, 192,
195, 198-204.

vesting, common law estates tail, 184, 185, 186.

contingent remainders abolished in England, 189.

statute later repealed, 189.

contingent and executory interests made alienable, 190.

"must vest," meaning, 210-211, 218, 219.

death of remainderman pending precedent estate, 86, 87,
88, 91, 211, 312, 316, 332, 333.

if once vested, Rule does not require divesting, 211, 212.

must vest in interest, meaning, 213-214.

number of allowable contingencies unlimited, 213.

when vesting in possession required, 213, 214, 233, 234,
235, 236, 237, 238, 239.

improbability of contingency immaterial, 214.

when vested remainder invalidated by contingent, 214.

when valid and void separable, 214, 290-307.

vesting of remainder on fee, 216-220.

(References are to Pages.)

VESTED AND CONTINGENT.—*Continued.*

- vesting of remainder on estate for life, 220-228.
- only vested can be accelerated, 221, 222.
- vesting of remainder on term of years, 229-231.
- contingent gift to corporation, 230.
- vesting in charitable corporation, 230.
- vesting of remainder on estate in trust, 231-239.
- vesting of remainder on execution of power, 239-247.
- effect on vesting, of power of sale, 247, 261.
- vesting of remainder in default of appointment, 247.
- vesting of remainder to class, 248, 249.
- vesting, in personal property, 252, 257, 258, 259-261, 262, 263, 264, 265.
- gifts for charity, 279-285.
- vesting favored by law, 10, 311, 346.
- vested and contingent at common law, 313-319.
- vested and contingent in New York, 319-343.
- definitions, scope of, 319-340.
- rules to aid in distinguishing, 313-347.

VESTING

- when required by end of statutory period, 175-249.

VOID,

- when separable from valid, 290-309.

WAIVER, 25.**WIDOW.**

- See **LIVES IN BEING, (9).**

WIFE.

- See **LIVES IN BEING, (9).**

WISCONSIN, 354-356.**YEARS, TERM OF.**

- restraints on alienation, 75-83.
- contingent freehold limited on, 179.
- remainder on, must vest when, 229-231.
- remainder on, to person in being, 229.
- limitations of chattels real, 229.
- estate for, term of suspension of ownership, 229.
- remainder of freehold or chattel real, 229.
- postponement of vesting for term of, 230.

WHOLE NUMBER OF PAGES, 460.

UC SOUTHERN REGIONAL LIBRARY FACILITY

AA 000 176 843 1